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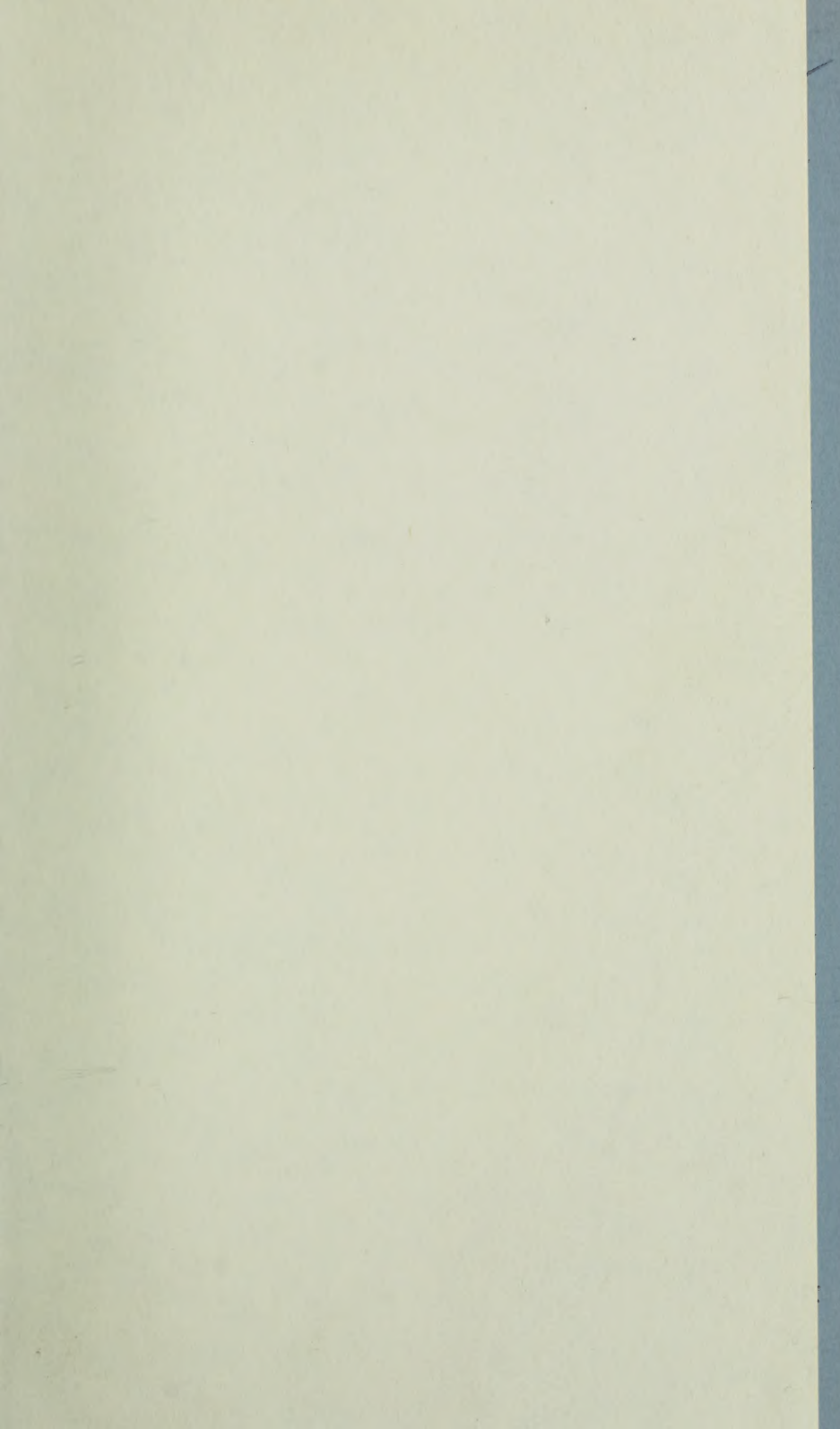
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United States
COURT OF APPEALS
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH,

Appellants,

vs.

FABRI-VALVE COMPANY OF AMERICA, a
corporation,

Appellee.

FABRI-VALVE COMPANY OF AMERICA, a
corporation,

Appellant,

vs.

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH,

Appellees.

**BRIEF OF THE UNITED STATES NATIONAL
BANK OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH, APPELLANTS
AND CROSS-APPELLEES**

*Appeals from the United States District Court for the
District of Oregon.*

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United States
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AND CROSS-APPELLEES**

*Appeals from the United States District Court for the
District of Oregon.*

The District Court adjudged claim 3 of the Smith
patent No. 2,001,271 to be infringed by the manufacture

and sale of gate valves as exemplified by defendant's gate valve bonnet Type A and by defendant's gate valve bonnetless Type B, as shown and illustrated by defendant's Exhibit D, plates 2 and 3, respectively. [Conclusions of Law No. II, p. 34, and Judgment, p. 35, Transcript of Record.]

Appellants, The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, have appealed from the judgment of the United States District Court for the District of Oregon, wherein the Court found, adjudged and decreed:

"The accused machines have recesses but do not have cavities and I therefore find that claims 1, 2, 5 and 6 have not been infringed." [Oral Opinion Dec. 31, 1952, p. 19, and Finding of Fact No. XI, p. 29, Transcript of Record.]

"In this case * * * the patented structure represented only a minor improvement in a highly developed art * * *."

"I find that a reasonable royalty is $1\frac{1}{2}\%$ of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which, according to my calculations, amounts to \$2,962.16." [Oral Opinion, June 17, 1953, p. 22, and Finding of Fact No. XIII, p. 30, Transcript of Record.]

"That plaintiffs have and recover from defendant general damages which shall be due compensation for the making, using and/or selling of the combination of the inventions of the Letters Patent in suit, which damages shall be in the principal sum of \$2962.16, together with interest thereon at the rate of six per cent (6%) per annum from May 14, 1952, until paid." [Judgment, p. 35, Transcript of Record.]

JURISDICTION

The District Court had jurisdiction under the Patent Laws (Title 28, United States Code, Section 1338), which provides:

“(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. * * *”

Jurisdiction is pleaded in paragraph IV of the Bill of Complaint [Transcript of Record, p. 4]. This Court has jurisdiction of this appeal (Title 28, United States Code, Section 1291).

STATEMENT OF THE CASE

The Smith patent in suit, No. 2,001,271, relates to a valve for controlling the flow of pulp stock in a pulp mill. Pulp stock consists of the ultimate fibers of wood separated by treating wood chips in a digester at elevated pressures in the presence of an acid. The individual fibers “averages probably one-thousandth of an inch in diameter and from a sixteenth to an eighth of an inch long.” [p. 107, Transcript of Record]. A slurry is made of the wood fibers and water and this mixture is conveyed through pipe lines under pressure and by gravity flow through flumes and header boxes in the pulp mill. Pumps and valves are mounted in the pipe lines and gates are provided in the walls of the header boxes for controlling and directing the flow of the pulp slurry. A header box in a pulp mill is similar to a header box in an irrigation

ditch and usually is equipped with gates in two or three of its side walls, which gates are employed to direct the flow from the header box to the desired flume [p. 111, Transcript of Record]. If all gates were to be closed and the flow to the header box continued, the slurry would overflow the header box in the same manner that a river would overflow a dam if all the gates in the dam were to be closed [p. 117, Transcript of Record].

A head gate of the type used to control the flow of water from an irrigation ditch is shown in the patent to Hedrick, No. 988,777. This same type of gate was used in the header boxes in pulp mills in the latter part of the year 1929 [pp. 93-94, Transcript of Record].

A valve is a device for controlling the flow of fluids in a pipe line, and is a completely enclosed structure so that pressure may be maintained on either or both sides thereof. A valve may be said to be a device for controlling fluids under pressure, whereas a head gate is a device for controlling the flow of fluids under gravity. Both valves and head gates are employed in a pulp mill.

Prior to the invention of the Smith valve the pulp and paper mills used plug valves—a cylindrical casing with a rotating plug with a round hole through the plug which could be brought into registry with inlet and outlet openings in the cylindrical casing. The fine fibers would collect between the rotating plug and the housing and become so tightly cemented therebetween as to make the valve difficult to operate. Another type of valve in use in pulp mills prior to Smith was the Reed valve—wherein a piston entered a cylinder to close inlet and

outlet orifices by blocking them off. The fine pulp would adhere to the walls of the cylinder and piston and make it impossible to move the piston to operate the valve [pp. 58 and 70, Transcript of Record].

The wedge type gate valve "is not a conventional stock valve to which the valves in suit more specifically relate" [p. 54, Transcript of Record] and each and every one of the witnesses called to testify at the trial of this case testified that wedge type gate valves were not used in pulp mills. Mr. Buckhorn, chief counsel for the defendant, addressed the Court thus:

"Your Honor, I object to that last question and again for the reason that the wedge gate valve is not a conventional stock valve to which the valves in suit more specifically relate. The wedge gate valve is never used in a stock flow line but is used merely in clear fluid line, a clear water line or something of that sort. It is not a conventional valve in a conventional flow line." [p. 54, Transcript]

Wedge type gate valves are exemplified by patents to Belfield, No. 105,027; Hewes, No. 127,768; Allt, No. 233,180; Lunken, No. 494,579; Lunkenheimer, Nos. 494,581 and 494,582; Patterson, No. 985,444; Snow, No. 1,179,047; Gill, No. 1,613,509; and Barker, No. 1,751,122. The reason wedge type gate valves were not in use in pulp flow lines is that the valve gate, under control of the valve stem, is first moved to a position spaced longitudinally of the valve from the seat and is then moved into contact with the seat by some kind of wedging means which wedges the gate against the seat to close the valve. In the wedge type of valve there is no cleansing of the seat by the descending gate, or in fact

any contact between the gate and the seat until the gate has been lowered into position opposite the seat and is wedged against the seat by the wedging devices [p. 121, Transcript of Record]. If used in a pulp mill to control the flow of pulp, the fibers would adhere to the face of the gate and to the seat and prevent the valve from closing.

Smith conceived a valve particularly adapted for controlling the flow of pulp stock in a pulp and/or paper mill. He describes the problem to be solved in the following language:

"Heretofore, in such valves, the pulp stock or other material tended to collect or lodge in the grooved valve seat, so that when the valve member is being closed the pulp is pressed between the valve and its seat and not only eventually prevents the valve from being entirely closed, but forms a hard tenacious, cement-like mass that resists the opening of the valve, and also lodges between the valve and the faces of the seat and tends to spring the valve member so that it is operated with difficulty." [Smith patent, col. 1, lines 5-15]

He then sets forth as the principal object of his invention the provision of a gate valve having means to prevent the accumulation of the pulp fibers on the valve seat. The principal object of the invention is stated as follows:

"The principal object of my invention is to provide a gate valve especially adapted for controlling the flow of heavily laden material through a pipe line without permitting the lodging of material on the valve seat and the springing or bowing of the gate out of shape by material collected in the said seat, or by the pressure in the pipe line." [Smith patent, col. 1, lines 33-40]

A further disadvantage incident to the use of gate valves in pulp mills prior to the invention of the Smith valve was the fact that in prior art valves the groove for the gate extended all the way down the sides and across the floor of the valve and, as stated in the Smith patent, "the pulp stock or other material tends to collect in the guideways or grooves of [for] the gate and cause the latter to bind and makes it very difficult to operate. This is aggravated by the fact that the pulp, if permitted to dry, forms a hard glue-like substance from which the gate may only be broken away by taking the valve housing apart."

See also testimony of M. L. Edwards, describing this problem, at pages 109-110, Transcript of Record. Also testimony of Walter G. E. Smith at page 80, Transcript of Record.

A further object of the Smith valve was to provide a solution for this problem, and the Smith patent so states:

"A further object of my invention is to provide a gate valve which will not accumulate material interfering with the closing of the gate, but is self-cleaning." [Col. 1, lines 41-44]

"Further, the guide grooves in the housing walls for the gate are cut away at their lower ends on the inlet side by the said recess in the bottom of the housing, whereby material collecting in the said grooves may be cleared away by the downward movement of the gate." [Col. 1, lines 49-54]

Smith recognized two major problems in connection with controlling the flow of pulp stock in a pulp or paper mill: (1) the tendency of the pulp fibers to adhere to the face of the valve seat and to the face of the

gate and prevent the valve from closing; and (2) the accumulation of pulp stock in the guide groove for the gate, and particularly in that portion of the groove across the floor of the valve, which would prevent the gate from being lowered into the groove and into contact with the seat.

Smith solved these problems by omitting the wall of the groove for the gate across the floor of the valve, thus forming a recess on the inlet or upstream side of the gate, and by providing a gate which would scrape the pulp stock from the face of the seat into the recess. The Smith patent describes this structure and its function as follows:

“By this construction any pulp stock or other material which may collect on the face c' of the housing part c is scraped off by the gate h into the recess j hence is prevented from being compressed or otherwise adhering to the valve housing, or interfering with the operation of the valve. When the gate is again opened, the material so collected in the recess will be carried away by the flow of material through the gate valve.” [Col. 2, lines 41-49]

“Further, the grooves g in which the gate h is slidable are cut away as at m at the bottom on the inlet side, down to the inclined bottom surface, j , see Figs. 1 and 5; thus any stock that has accumulated in said grooves is scraped off by the edge of the gate and discharged on to the bottom surface or floor of the housing and carried away with the next flow of material thru the gate valve.” [Col. 3, lines 16-23]

Original claims 6, 7 and 8, submitted with the application for patent as filed, described the recess in the floor of the valve in the following language:

“* * * a recess in the floor of said housing on the inlet side of said gate, said recess extending laterally whereby the walls of said guide grooves of the gate are cut away by the recess on the inlet side, * * *.”

In the Smith valve the seat is on the downstream or outlet side of the gate. The seat is formed by the face c' of the housing part c and supports the gate against the thrust of the pressure of the inlet fluid as the gate is being closed. Since any pulp stock which has accumulated on the face of the seat, or in the guide grooves for the gate, is scraped off by the descending gate and discharged into the recess in the floor of the valve on the upstream or inlet side of the gate, when the gate is opened such material is flushed up and over the lower portion of the transverse wall which forms the seat and is carried away by the flow of material through the valve. In prior art patents for gate type valves, such as Gill No. 1,613,509, any such recess was on the downstream or outlet side of the gate and the wall of the guide groove on the upstream side caused the pulp stock to accumulate in the groove much in the same manner as snow accumulates or “drifts” on the lee side of a snow fence or other obstruction.

The patent recites that the outlet port in the Smith valve is formed V-shaped at the bottom, as at l ,

“whereby the outlet opening, as the gate is closed, is diminished laterally by the wall portion l' at an equal and uniform rate and the gate is thus supported at its sides as it is closed, and the pressure of the material on the gate, which increases relatively to the decreased size of the opening, is prevented from springing or bowing the gate against the outlet

port, and thus interfering with the operation of the gate. This is particularly important for the reason that in providing the lower edge of the gate with a beveled edge, it is somewhat weakened, and the tendency to be bowed by the pressure of the stock is increased."

The V-shaped outlet opening was thought to be necessary should pipe line pressures run from 125 to 150 pounds per square inch, but, since "actual pulp mill pressure is rarely over 30 it made a lot of difference" [p. 87, Transcript]. The Smith valves are made with round outlet openings, and a 14 inch valve installed twenty years ago in the Crown Zellerbach mill at Camas, Washington, and having a round outlet opening is still in use [p. 78, Transcript]. Mr. Harold S. Hilton, sales engineer for the defendant company, designer of the infringing valves, testified that with the same area of opening of the outlet port the transverse wall of the infringing valve would provide the same amount of support for the gate as in the Smith valve.

Defendant's gate valves embody each and every structural element of the Smith valve. Defendant's gate valve bonnetless type B is substantially a Chinese copy of the Smith valve. Both the Smith valve and the infringing valve are made of several separate parts. In each valve the housing for the inlet port is bolted to the housing for the outlet port with a spacer plate positioned between the meeting ends of the housings to form a guide groove for the gate. In each of these valves the face of the end wall of the housing for the outlet port forms the seat and supports the gate against the thrust

of the pressure of the inlet fluid. In each valve any stock that has accumulated on the face of the seat or in the guide grooves is scraped off by the edge of the gate and discharged onto the bottom surface or floor of the housing on the inlet side of the gate and is carried away with the next flow of material through the valve. In each valve the wall of the guide groove for the gate is cut away (or omitted) on the inlet side of the gate, thus forming a recess (but not a groove) in the floor of the housing on the inlet side of the seat. In a valve in which the housing is of rectangular shape at mid-portion (as illustrated in the Smith patent) the recess in the floor of the housing extends laterally to such extent that the walls of the guide groove on the inlet side are cut away. In defendant's valves the housing is round, but in each valve (types A and B) the walls of the guide groove on the inlet side also are cut away by the recess formed in front of the "transverse wall" or valve seat.

SPECIFICATIONS OF ERROR

Appellants rely upon each of the errors assigned by them in the Statement of Points on Appeal, filed June 14, 1954. For convenience of the Court these assignments of error may be grouped and discussed by groups, as follows:

I. The District Court erred in finding claims 1, 2, 5 and 6 of the Smith patent in suit not infringed by valves manufactured and sold by defendant for the reason that each of these claims provides for cavities *at the bottom*

of the side wall on the inlet side, and the accused valves have recesses but do not have *cavities* [Oral opinion, December 31, 1952, p. 19, Transcript]. Statement of Points on Appeal, paragraphs numbered 1 and 2.

II. The District Court erred in holding that the patented structure of the Smith patent in suit represented only a minor improvement in a highly developed art [Oral opinion, June 17, 1953, p. 22, Transcript]. Statement of Points on Appeal, paragraph 3.

III. The District Court erred in refusing to use plaintiffs' established royalty as the measure of damages to be assessed against defendant for infringement of the Smith patent in suit, and in refusing to find that plaintiffs are entitled to receive as damages a royalty computed at the rate of five per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which is the royalty established by all licenses given and granted prior to the commencement of the acts of defendant complained of [Oral opinion, June 17, 1953, p. 22, Transcript]. Statement of Points on Appeal, paragraphs numbered 5 and 7.

IV. The District Court erred in holding that plaintiffs were entitled to receive as damages royalties computed at a rate of no more than one and one-half per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which royalties at such rate amount to \$2962.16 [Oral opinion, June 17, 1952, p. 22, Transcript]. Statement of Points of Appeal, paragraph 4.

V. The District Court erred in refusing to find that plaintiffs were entitled to receive as damages additional royalties computed at the rate of seven and one-half per cent of the total sales price of all the valves sold by defendant in the eleven Western states between April 13, 1950 and May 14, 1952 in direct and unlawful competition with plaintiffs' licensee, Western Machinery Company [Findings of Fact No. XX, p. 24, Transcript]. Statement of Points on Appeal, paragraph 6.

SUMMARY OF ARGUMENT

I. The improvements which characterize the Smith valve, and which distinguish it from all gate valves known theretofore were new, novel and patentable at the time Smith made application for Letters Patent therefor. These improvements constituted a very real contribution to the art and provided a solution for a very real problem in the handling of paper and pulp stock.

The prior patents cited by the Examiner at the Patent Office during prosecution of the Smith application were not pertinent to the invention. The greater number of them relate to wedge type valves in which the gate does not contact the seat until the gate has been moved to closing position, so that there is no scraping of the seat by the gate in any such wedge type valve. Claims broadly defining the Smith invention were allowed notwithstanding the citation of such patents. The District Court found, therefore, that "the arguments of the law-

yer [who prosecuted the Smith application for Letters Patent] * * * and his attempt to distinguish Gill and Hedrick do not constitute file wrapper estoppel."

Plates 1, 2 and 3 of defendant's exhibit D show isometric views of the Smith valve and of defendant's bonnet type valve (type A) and defendant's bonnetless type valve (type B). These drawings show the gates, the grooves formed in the side walls of the housings, the transverse walls or seats which support the respective gates against the thrust of the pressure of the inlet fluid, the floor of each valve on the inlet side of the gate, the fact that each gate is provided with a cutting edge, and the recess in the floor of each valve on the inlet side of the gate formed by omitting the wall of the groove on the inlet side of the gate.

In comparing the valve structures as shown in these views, let it first be understood that the rings welded to the valve housing in defendant's bonnet type gate valve *are part of the housing*. It makes no difference whether defendant casts his housing in one piece or fabricates it from a number of pieces welded together. Welding makes the parts integral, and they are one. The Smith claims call for "grooves formed in the side walls of the housing". Grooves formed by spaced rings welded to the tubing in defendant's device are as much "grooves formed in the side walls" as grooves formed by so casting the housing in plaintiffs' device. Defendant is trying to make the Smith claims say: "*recessed into the side walls*", and to make this mean something different than "formed in the side walls", which is the language of the claims.

Plate 2 of defendant's exhibit D shows defendant's bonnet type gate valve wherein the spaced rings 15 and 16 welded to the valve housing provide "grooves formed in the side walls". The ring 16 on the inlet side of the valve is cut away to provide a recess in the floor of the valve housing. The cut ends of the ring form V-shaped cavities wherein the V lies on its side, and thus the cavity shaped by the angle formed by the end of the ring with the circular wall is not wholly unlike the cavities in plaintiffs' valve. These cavities certainly do connect with the grooves within which the gate is slidable, and serve the purpose of assisting in the escape of material scraped off by the gate while being closed. This material escapes into the recess in the floor of the valve between the ends of the ring, from whence it is swept over the solid ring on the outlet side of the gate whenever the gate is opened.

Plate 3 shows defendant's bonnetless type gate valve wherein the lower half of the housing at the gate is made in a shape created by overlapping circles. The floor of the valve on the outlet side of the valve is on the arc of one circle, whereas the floor of the valve on the inlet side of the valve is on the arc of a circle whose center is spaced from the center of the first circle by a distance equal to the height of the transverse wall 15.

The differences between plaintiffs' and defendant's valves in this respect exist largely because of the difference in shape of the outlet port—one being round and the other square. If both were the same shape, then differences would disappear, because, basically, the same type of structural elements is involved.

Defendant says that the greater portion of the flange in the type B valve, and the lower ring portion of the type A valve, on the inlet side of the gate, are omitted. Defendant further says that these portions are omitted to eliminate the formation of a pocket at the lower end of the gate which might fill up with debris. Let the Honorable Court understand that the forward wall of the groove in plaintiffs' valve is removed *for exactly the same reason*. Each valve has the same features (in slightly different form) to serve exactly the same function. Defendant's valve is so closely a copy of plaintiffs' valve that it needs must take the novel features of plaintiffs' construction along with those portions which are conventional in valve construction. It is plaintiffs' contention that defendant's valve utilizes structural features which are the full mechanical equivalents of the same parts employed by plaintiffs and which perform the same functions, and that plaintiffs' patent is entitled to a range of equivalents which is inclusive thereof.

II. The structural features of plaintiffs' valve, which differentiate it from valves known and in use prior to December 3, 1930 (the date of filing of the application which matured as the Smith patent in suit) are these:

(a) The seat for the gate is on the outlet side of the gate, the gate being held against its seat during movement between open and closed positions by closely fitting grooves in the valve housing and by the force of the fluid flowing through the valve. Defendant's valve utilizes this feature of Smith's contribution to the art.

In single wedge type gates such as shown by Gill, Belfield, Lunkenheimer, Patterson, and others, the gate does not engage the seat until almost in the closed position, at which time it is wedged against the seat by the action of the wall 6 in Gill, the inclined ribs ff in Belfield, the wedging piece G in Lunkenheimer, and the guide surfaces KK in Patterson. These wedging elements thrust the gate forward against the force of the flow through the valve with a sudden motion, so that there is no contact with the valve seat by the descending valve, as in plaintiffs' and defendant's valves, until the gate is almost in closed position.

(b) Because it is held tightly against its seat, the gate in plaintiffs' valve is provided with a cutting edge to scrape material from the face of the seat and to plow material from the guide grooves away from the lower portion of the seat when the gate reaches closed position.

The Brooks patent shows a knife edge on the gate, which sharpened edge 19 is provided for cutting into short length objects of any appreciable length which may be passing through the valve. The gate 9 of Brooks is not expected to scrape material from the valve seat, for the reason that the seat is on the upstream or inlet side of the gate, and pulp fibers and the like material would not tend to adhere thereto, but, rather, to the outlet side of the groove. The knife edge of Brooks' gate would not scrape material from the walls of the groove on the outlet side of the gate for the reason that it does not contact that side of the groove, but, rather, is pressed

against the seat on the inlet side of the gate, as in the Gill, Patterson and Belfield patents.

Defendant's structure follows plaintiffs' teaching in this respect, and defendant's gate is made to scrape material from the valve seat on the outlet side of the gate.

(c) The wall on the inlet side of the groove in which the gate slides is omitted at the floor or lower portion of the valve housing.

This structure is not shown in any prior art patent. The construction is practical for the reason that, once the gate is closed, the pressure of fluid on the inlet side of the gate holds the gate against the seat. The omitted wall of the groove provides a recess on the inlet side of the gate into which the material scraped from the guide grooves and from the face of the valve seat can collect without interfering with the action of the gate. This is an extremely important feature of the Smith valve, and defendant has copied this feature in an infringing structure.

(d) The valve housing is so shaped [provided with cavities] at the lower ends of the guide grooves to enable material to flow from the grooves ahead of the descending gate. These "cavities" are the edge portions of the recess in the floor of the inlet side of the housing, and are provided to permit material to get away from the lower ends of the guide grooves.

There is no disclosure of this element in the prior art. Defendants' valves embody the full equivalent of

this feature by a structure which provides that the material which is removed from the grooves by the descending gate can flow away from the lower ends of the grooves and out into the recess created by the omitted forward wall of the grooves.

(e) In the Smith valve, the gate is made of sufficient length so that even in closed position it extends through the stuffing box so that accumulations of pulp in the bonnet cannot interfere with movement of the gate, as could happen in the valve where the entire gate descends out of the bonnet, leaving the empty bonnet to fill with pulp, as in Gill.

This feature is not shown in the prior art, for the reason that this type of construction was not known to the art before the advent of the Smith valve. Defendant employs the same construction in the valve shown on Plate 3. The construction is shown in the pictorial representation at the upper right-hand corner of the drawing.

(f) A transverse wall separating the inlet and outlet ports and provided with an opening, which wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, whereby the cutting edge of the gate makes a relatively oblique cut through the material located in the opening.

No prior art patents show the transverse wall supporting the gate against the thrust of the pressure of the inlet fluid, the gate being held against the wall during

movement from open to closed position, to make an oblique cut through material located in the opening. Defendant's valves utilize this exact structure. The transverse wall of defendant's valves support the gate against the thrust of the pressure of the inlet fluid in exactly the same manner as does the transverse wall of the Smith valve. Defendant's own witnesses so testified.

III. Plaintiffs have proved the existence of *established royalties* by introducing in evidence copies of the licenses granted to Crane Company and to Crane Company of Canada for the exclusive manufacture, sale and distribution of the patented valves, except in the eleven Western states of the United States, for which the licensees paid a license fee or royalty of 5% of the sales price. These licenses were granted in 1938 and 1939, respectively. In 1945 plaintiffs granted an exclusive license to Western Machinery Company of Portland, Oregon, for the territory not covered by the Crane Company license. Western Machinery Company agreed to pay a license fee or royalty of $12\frac{1}{2}\%$, but it is understood that the royalty payment was split, $7\frac{1}{2}\%$ to Smith for the use of drawings, specifications and patterns, and 5% to the owners of the patent as royalty for the manufacture, use and sale of the patented valve. Thus, it appears that in the United States two licensees enjoyed the exclusive right to make, use and sell the patented valve in their respective territories, and in Canada a third licensee acquired the exclusive right to make, use and sell the patented valve throughout that country. Each of the licensees was required to pay a royalty of 5% of

the sales price for the right to make, use and sell the valves.

The fact that there was but one license fee for a given territory does not prevent plaintiffs from establishing the fact of *established royalties*. In *Reliance Construction Company et al v. Hassam Paving Company et al.*, C.C.A. 9; 248 F. 701, the Oregon Hassam Paving Company was granted the *exclusive* right, license and privilege to make, use and sell the patented invention within the state of Oregon. In that case the Ninth Circuit Court of Appeals held that the license fee was an *established* royalty. In *Carley Life Float Company v. United States*, 13 Pat. Q. 112, the Court of Claims held that in a suit against the United States to recover just and reasonable compensation for infringement, brought by the owner of the patent who had granted an *exclusive license* to manufacture and sell, the percentage of the selling price of the patented article paid by the exclusive licensee was a proper basis for the determination of the compensation due the plaintiff by reason of the infringement. The Court quoted with favor the excerpts from *Clark v. Wooster*, 119 U.S. 322, 326.

Plaintiffs also have proven the nature of the invention, its utility and advantages and the extent of use involved. Crane Company has been a licensee under the patent since 1938, and has supplied the Smith valve to the paper and pulp industry since that date. The advertisements running in *Time Magazine*, of which a tear sheet is in evidence in this cause (plaintiffs' exhibit No. 21), illustrates the general acceptance and utility of

the valve. The royalty paid was 5% of the sales price. The fact that defendant manufactured and sold infringing valves for which sales between the dates of April 13, 1950 and May 14, 1952—a period of two years and one month—amounted to \$197,476.73, itself indicates the value and demand for the valve and the fact of its universal acceptance by the pulp and paper industry. The three licensees have assumed the patent to be valid, and respected plaintiffs' rights therein, and have continued to pay the required license fees up to the date of expiration of the patent, notwithstanding defendant's infringement thereof.

The Court has erred in finding that defendant shall have had the privilege of doing business under the patent for a less fee than was paid by the legitimate licensees. It should be the other way around. The language of the Ninth Circuit Court of Appeals in *Reliance Construction Company et al. v. Hassam Paving Company, et al.*, *supra*, is a just and proper pronouncement of the equities in such cases. It will be remembered that in that case the Court held that the royalty charged an exclusive licensee, who invested capital and incurred the expense of preparing plants and entered into the business of supplying the patented articles, would be an *inadequate* royalty and measure of damages for infringement. The Court said:

“For the infringer in this case to pay the licensee damages measured [in the figures of the same royalty as paid by a legitimate licensee] would not meet the demands of justice.”

In *General Motors Corporation v. Blackmore*, 53 F. 2d 725, Circuit Judge Hickenlooper said that the infringer was not entitled to equality of treatment with the licensee, and certainly not preferential treatment. In the present case the Court has given the infringer preferential treatment by assessing a royalty of $1\frac{1}{2}\%$ for the infringement, whereas the legitimate licensees have paid a royalty of 5%.

IV. In fixing a *reasonable* royalty for infringement [as differentiated from an *established* royalty], the primary inquiry is what the parties would have agreed to do, if both were reasonably trying to reach an agreement, in the determination of which the commercial situation must be considered.

In *Egry Register Co. v. Standard Register Co.*, 23 F. (2d) 438, 443, the Circuit Court of Appeals for the 6th Circuit adopted the following theory of recovery on the basis of "reasonable royalty":

"To adopt a *reasonable* royalty as the measure of damages is to adopt and interpret, as well as may be, the fiction that a license was to be granted at the time of beginning the infringement, and then to determine what the license price should have been. In effect, the court assumes the existence, ab initio of, and declares the equitable terms of, a suppositious license, and does this nunc pro tunc; it creates and applies retrospectively a compulsory license."

Pertinent to this subject is the statement of District Judge Clark, speaking for the Court of Appeals for the Ninth Circuit in *The Filtex Corporation v. Atiyeh*, 103 USPQ 197:

“As to what would be a reasonable royalty presents a serious question. Many factors determine a reasonable royalty other than the precise improvement. The entire unit must be considered. However, it must be borne in mind that the defendant in this case is the wrongdoer and as stated in *Horvath v. McCord Radiator & Mfg. Co. et al.*, 100 F. (d 326-335, 40 USPQ 394, 402-403:

“ ‘McCord is an infringer and the burden must be placed upon it as a wrongdoer and it is the duty of the Court to find for Horvath with reasonable approximation that to which he is entitled and in so doing, there is no duty to exercise meticulous care to avoid a hardship on McCord.’

“It is earnestly contended by the defendant that the royalty of ten percent allowed by the master was too high, but from an examination of the record we see no reason which would warrant disturbing the findings of the master or the finding of the trial Court sustaining his finding.”

In the instant case it can hardly be expected that the plaintiffs would have granted defendant a license at a lesser royalty or license fee than prior licensees were paying. To do so would have been to grant defendant a preferential position in the trade—and when one considers the larger volume of sales by Crane Company and the years of its satisfactory operation under the license, it is inconceivable that plaintiffs would grant defendant a license that would be detrimental to the prior licensee.

V. Plaintiffs' losses are two-fold:

(1) Loss suffered by the United States National Bank, Trustee, of royalties computed at the rate of 5% of the total sales price of all valves manufactured

and sold by defendant between April 13, 1950 and May 14, 1952. Defendant's total sales of all valves manufactured and sold between April 13, 1950 and May 14, 1952 amountd to \$197,476.73, and plaintiff, The United States National Bank, Trustee, is entitled to recover from defendant damages computed as 5% of this amount, which is the sum of \$9873.84.

(2) Loss suffered by Walter G. E. Smith of 7½% of the total sales price of all said valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952. This statement of plaintiffs' losses is based on the assumption that plaintiffs' licensees would have manufactured and sold the valves which defendant manufactured and sold had defendant not infringed the Smith patent. This is believed to be a logical and safe assumption for the reason that the Smith valve has been universally accepted by the trade, and the Smith licensees were the only manufacturers of this type of valve up to the time of defendant's appropriation thereof. Since Western Machinery Company was an *exclusive* licensee for the territory of the eleven Western states, it is reasonable to assume that Western Machinery Company would have received orders for valves which defendant sold in this territory. Defendant's sales in the eleven Western states amounted to \$179,617.93, and plaintiff, Walter G. E. Smith, is entitled to recover from defendant damages computed as 7½% of this amount, said damages amounting to \$13,471.34.

ARGUMENT

There is error in the District Court's finding that the valves manufactured by defendant do not provide *cavities* in the side walls of the inlet ends of defendant's valve housings connected with the guide grooves in which to receive the material scraped off by the gate while being closed.

The Smith Valve

Plaintiffs contend that the "cavities connecting with said grooves in which to receive the material scraped off by the gate while being closed", as recited in claim 1 of the Smith patent, is one and the same thing as the recess *j* shown in the drawings, described in the specifications, and named as an element in claims presented during prosecution of the application.

It must be remembered that the principal object of the Smith invention was to provide a gate valve especially adapted to control the flow of heavily laden material through a pipe line without permitting the lodging of material on the valve seat and the springing or bowing of the gate out of shape by material collected on the said seat, or by the pressure in the pipe line [p. 1, col. 1, lines 33 et seq.].

The description of the valve in the Smith patent recites that the guide grooves in the housing walls for the gate are cut away at their lower ends *on the inlet side* by the recess in the bottom of the housing, whereby

material collecting in the grooves may be cleared away by the downward movement of the gate [p. 1, col. 1, lines 49 et seq.]. There is no description in the Smith patent of *cavities m* in the wall of the housing. The description of the valve says that the floor of the valve slopes downward from the inlet port *e* toward the seat *k* of the gate *h* to provide a recess *j*. The specification also says that the *grooves g in which the gate is slideable are cut away as at m* [it is the front wall of grooves *g* which are cut away] down to the inclined bottom surface *j*. In other words, insofar as the Smith valve is described in the patent, the reference letter *m* is intended to show where the groove *g* is cut away on the inlet side down to the inclined bottom surface *j* in order that stock which accumulates in the grooves, and which is scraped off by the edge of the gate, will be discharged onto the bottom surface *j* of the housing. From thence it may be carried away with the next flow of material through the gate.

The reason for cutting away the bottom portion of the *wall of the groove on the inlet side* is so that any stock that has accumulated in said groove, and which may be scraped off by the edge of the gate, will be spilled out of the groove onto the bottom surface or floor of the housing, to be carried away with the next flow of material when the gate is opened.

This fact is uncontrovertible: Smith did not describe a cavity *m*. The word "cavity" does not appear in the application as filed, nor in the specification of the patent as granted. *Smith did not use the letter m to point to*

a cavity in the side walls of the housing, but rather to a cut away portion of the inlet side of the wall of the groove *g*. This is the meaning of Smith's statement on page 1, column 1, lines 49 et seq., where he says:

"The guide grooves in the housing walls * * * are cut away at their lower ends on the inlet side by the recess in the bottom of the housing."

It is the lateral extension of the recess *j*—the recess in the floor of the housing on the inlet side—which cuts away the wall of the groove *g* on the inlet side as shown at *m*.

Defendant's Bonnetless Type B Valve

Plate 3 of defendant's exhibit D shows a bonnetless type (Type B) of valve which incorporates all of the elements of plaintiffs' construction and closely resembles the Smith valve. The valve is made of a housing in two parts—an inlet part and an outlet part with a spacer plate interposed therebetween to form grooves in the side walls of the housing in which the gate slides. The wall of the grooves on the outlet side is formed by the face of the outlet portion of the housing, and this face forms the transverse wall against which the gate slides, exactly as in the Smith valve. Because of the closely fitting walls of the grooves, *the gate slides against the face of the transverse wall* as the gate moves from open to closed positions.

In defendant's valves the gate is tapered or beveled at its lower edge *towards the outlet side* to form a knife edge to scrape material from the face of the transverse

wall and to plow material from the guide grooves and away from the valve seat as the gate approaches closed position.

In defendant's valve, shown on Plate 3 of defendant's exhibit D, *the floor of the inlet side of the housing inclines downwardly toward the cutting edge of the gate when in closed position.* This can best be seen by examination of the side elevation of the valve shown at the upper left-hand corner of defendant's Plate 3.

The recess formed in the floor of the inlet side of the housing extends laterally (from side to side of the housing) and cuts away the walls of the grooves for the gate on the inlet side so that material scraped off the face of the "transverse wall" can be received into the recess in the floor of the housing. The Smith patent describes the "cavities" in the side walls of the housing as:

"The guide grooves in the housing walls for the gate are cut away at their lower ends on the inlet side of the said recess in the bottom of the housing, whereby material collecting in said grooves may be cleared away by the downward movement of the gate." (p. 1, col. 1, lines 49-54)

The structure as thus described in the Smith patent is duplicated in the valve shown on Plate 3 of defendant's exhibit D.

The outlet housing in defendant's valve frames a round opening, the lower end of which is arcuate instead of V-shape. The only differences between the valve shown in defendant's Plate 3 and the Smith valve are (1) the shape of the opening through the transverse wall

which forms the valve seat, (2) the fact that the lower end of defendant's gate is arcuate whereas the lower end of the Smith gate is rectangular, and (3) the *shape* of the "cavities" at the bottom of the grooves in which to receive the material scraped off by the gate while being closed. Defendant's drawing on Plate 3 does not show the shape of the housing which creates the "cavities" connecting with the grooves in which to receive the material scraped off by the gate while being closed, but an examination of plaintiffs' exhibit 9 reveals the presence of this element created by extending the recess in the floor of the housing sufficiently far enough to each side to cut away the walls on the inlet side of the groove, and this is exactly the same way that the "cavities" are created in the Smith valve, the only difference being in the shape of the cavities caused by the difference in the shape of the opening through the valve.

Mr. Hilton, designor of defendant's valves, testified that the transverse wall of defendant's valve *supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed*, and that when the area of this opening through defendant's valve is approximately the same as the area of the opening through the Smith valve, the support for the gate is approximately the same. His testimony follows:

"Q. I believe you testified that all of these gate valves required what you are pleased to call a transverse wall; is that true?

A. That is correct, on the outlet side they all have a complete circular seat.

Q. Some kind of a seating support there to support the gate?

A. That's right." (Transcript, p. 158)

Q. One more thing that brings up. Because of the difference in shape of the openings in this, in plaintiffs' valve is a V-shaped opening, and when the gate is lowered to say within a half inch of the extreme bottom of the opening, which leaves a certain area, I don't know how much, perhaps a square inch or half an inch, I don't know, I haven't figured it up, and the same thing happens in defendant's valves because of the crescent moon that it makes. The gate can come a great deal closer to the extreme bottom of the valve and still have the same amount of area because the area is in a longer, thinner line, but with the same volume of material going through the valve you would have approximately the same support on your transverse wall with the same area open. Do you agree to that, Mr. Hilton?

A. Well I would have to lie one across the other to measure it, but it sounds reasonable, yes." (Transcript, p. 159)

A comparison of the valve shown on Plate 3 of defendant's exhibit D with the Smith valve poses the following questions.

All other structural elements being alike, each a counterpart of the other, and employed in the same relationship in each of the valves:

(a) Is defendant's structure wherein the recess in the floor of the inlet housing extends to each side far enough to cut away the lower ends of the grooves for the gate the full equivalent of "cavities" provided in the side walls of plaintiffs' structure, where in both plaintiffs' and defendant's valves the "cavities" connect with said grooves to receive the material scraped off by the gate while being closed?

(b) Is the arcuate lower end of the opening through the transverse wall in defendant's structure the full equivalent of the V-shaped lower end of the same opening in plaintiffs' structure, no reason being assigned for changing the shape of said opening other than to avoid the claims of the Smith patent?

Defendant's Bonnet Type A Valve

Plate 2 of defendant's exhibit D shows a valve having an inlet port and an outlet port and a gate slidable between said ports in grooves formed by parallel rings mounted on the inner walls of the tubing forming the housing. Mr. Hilton, who designed defendant's valves, testified that the ring 15 in the valve shown in defendant's Plate 2 functions as a transverse wall. His testimony follows:

"Q. And in the structure shown on Plate 2 which, I believe, is the Exhibit O, the ring, the solid ring, the complete ring in that structure functions as a transverse wall; is that true?

A. That is correct. That is the seating ring on the outlet side of the bonnet type, yes."

The ring 16 is cut away adjacent the floor of the inlet side of the housing to form a recess for receiving material scraped off the transverse wall by the gate while being closed. Mr. Hilton testified:

"Q. And some of the fibers, you say, which collect in the groove is pushed ahead of the gate and out of the groove and onto the floor of the valve; is that correct?

A. Well, it would have to to close the valve, yes." (Transcript, p. 53)

* * *

Q. In the valves wherein you have parallel rings mounted to make the groove for the gate, the ring on the upstream side or the inlet side of the valve is cut away at the bottom of the valve for what purpose?

A. The same reason that this is cut away.”
(Transcript, p. 56)

[The witness was referring to plaintiffs' Exhibit 7 showing the wall on the inlet side of the groove cut away adjacent the floor of the valve.] It will be seen that the ring 16 is cut away adjacent the floor of the inlet end of the housing in defendant's valve of Plate 2 to form a recess for receiving material scraped off of the transverse wall by the gate while being closed.

Mr. Smith testified that in the valve illustrated on Plate 2 the recess between the ends 17 of the ring 16 is the equivalent of the Smith structure wherein the depressed floor in the inlet housing forms the recess *j*. (Transcript, pp. 114-115). His testimony in this respect was not traversed.

In the valve structure shown on Plate 2 of defendant's exhibit D, the rings 15 and 16 must be considered as being an integral part of the walls of the housing, since they are welded thereto and are made a permanent part thereof. It will be noted that the ends 17 of the ring 16 are cut away adjacent the floor of the valve and form "cavities" whereby material collecting in the groove may be cleared away by the downward movement of the gate. In other words, the purpose and function of the cut away ring 16 in defendant's structure is exactly the same as the "cavities" in the side walls of the inlet hous-

ing of the Smith valve. Plaintiffs contend, therefore, that the cut away ring 16 creates a "cavity" connecting with the grooves in which the gate is slidable in which to receive the material scraped off by the gate while being closed. Else why was a portion of the ring removed? To prevail, must plaintiffs' claims say, "a portion of the *wall of said inlet side being cut away to create a cavity connecting with said groove to receive the material scraped off by the gate while being closed*"? Certainly, the word "cavities" (which plaintiffs' patent defines as being formed by the recess in the bottom of the housing) is of sufficient scope to cover a structure created by the same means to perform the same function in substantially the same manner to accomplish the same results.

Mr. Smith testified that the *bottom* of the housing in defendant's valve is a surface marked by a plane extending from the inner edge of the inlet port 11 to the inner surface of the ring 15, and that beneath this plane, in the area between the ends 17 of the ring 16, is the recess in the floor of the inlet housing. The testimony was not controverted. Using the language of the Smith patent: "any pulp stock or other material which may collect on the face *c'* of the housing part *c* is scraped off by the plate *h* into the recess *j*, hence is prevented from being compressed or otherwise adhering to the valve housing, or interfering with the operation of the valve." Mr. Hilton testified that the purpose of this recess is "so that it [the groove] will not trap any material in between the two seats like a wedge gate, as you have indicated, and build it [an accumulation of pulp] up so you cannot shut it [the gate]." (Transcript, p. 54)

A comparison of defendant's valve shown on Plate 2 with the Smith valve poses the following questions:

(c) The rings 15 and 16 of defendant's valve structure being welded to and made a part of the walls of the valve housing, are the grooves formed by said rings the full equivalent of "grooves formed in the side walls of said housing" as recited by the claims in the Smith patent?

(d) Is the ring 15 of defendant's valve structure the full equivalent of "a transverse wall separating the inlet and outlet ports" as called for by the claims in suit, 3, 5 and 6?

(e) Is the area between the ends 17 of the ring 16 in defendant's valve structure the full equivalent of the recess *j* of the Smith valve, in which to receive material which may collect on the face of the ring 15 and be scraped therefrom by the gate 14 while being closed?

(f) Are the cavities formed by the cut away portion of the ring 16, adjacent the ends 17 [the ring 16 being an integral part of the housing wall] the full equivalent of "cavities in the walls of the inlet side of the housing connected with the grooves in which to receive the material scraped off by the gate while being closed"?

If these questions can be answered in the affirmative, then plaintiffs must prevail.

Defendant says that in both of defendant's valves the defendant simply omits or terminates the outwardly ex-

tending flanges or rings defining the gate grooves at a point above the bottom of the valve and on one side of the gate, thereby permitting escape of pulp stock which is pushed downwardly by the descending gate (p. 6). Defendant says that such termination of the gate groove is shown by certain ones of the prior art (p. 6), *but not on the inlet side of the valve. This was a novel concept on the part of Smith, and defendant copied him!* The defendant says that whether such omission is made on the inlet or outlet side of the gate is of no moment. *But defendant copied the structure!* And defendant well knows that to change relative location of parts *when function is changed*, as in the instant case, amounts to invention! 69 C.J.S. 284.

Law Relating to Substitution of Equivalents

“What shall it profit a patentee that his patent is declared valid if his claims are so precisely read, the range of equivalents so narrowly confined, that piracy is rewarded for the cunningness of its dissimulation and the patentee is robbed of the fruits of his invention?”

—Circuit Judge Hutcheson.

In applying the law relating to substitution of equivalents, Circuit Judge Hutcheson, of the Circuit Court of Appeals for the Fifth Circuit, in *Matthews et al. v. Koolvent Metal Awning Company*, 158 F. 2d 37; 71 USPQ 219, says:

“We are not concerned here with determining whether defendant’s device, which plaintiffs charge is an infringement of the *Matthews* patent, is exactly the same in appearance or in form, but merely

whether it is substantially the same function. In short, the decisive question here is reading the claims of plaintiffs' patent on the Koolvent awning and interpreting them fairly in accordance with their plain intent and coverage, does defendant's device infringe? We think it does. The doctrine of equivalency has never been a mere dry bones doctrine. Put forward to do justice and prevent defrauding by dissimulation and deceit, it should be, it has been, applied to give its equitable purpose effect. Not at all recondite or difficult of understanding or application, it is the mere expression and application of the view that like things are alike and that they are not made unlike by formal and nonsubstantial changes, no matter how cunningly contrived the dissimulation, how clever the changes in form. We think it clear that defendant's device is substantially identical in function with, and is an infringement of, claims three, four, five, nine and ten of the Matthews patent.

"The judgment is reversed, and the cause is remanded for further proceedings consistent herewith."

The pronouncement of the Circuit Court of Appeals for the 7th Circuit in *Union Asbestos & Rubber Company v. Gustin-Bacon Manufacturing Company*, 169 F. 2d 686; 78 USPQ 238, is an answer to defendant's contention that plaintiffs are limited to a transverse wall provided with an opening having its lower end formed V-shape. The Court's decision recites that the patent was granted in a crowded art and that the claims must be strictly construed in the light of the specification. The patent specification discloses the use of asbestos as its preferred embodiment of a "heat insulating fiber filling material", and the alleged infringer used a glass fiber filler for such purpose. Circuit Judge Spark said:

"Each constitutes a filler of heat insulating fiber filling material, and they differ only in kind. They perform the same service, in the same manner, by the same means and for the same purpose.

"* * * True the specification refers neither directly nor indirectly to any sort of a filler except asbestos, yet applicant was only required to set forth his preferred sort of filler material, as defined by the claim, and by so doing he would not be precluded from protection against the use of any sort of filler material which would fully meet the requirements of the claim."

District Judge Ridge, of the District Court of the Western District of Missouri, in *Cissell v. Cleaners Specialties, Inc.*, 81 F.S. 71, 79 USPQ 395, in a rather extended discussion of the law relating to substitution of equivalents, makes these observations:

"There is a structural difference between defendant's device and plaintiff's invention. Infringement is not avoided on that ground if defendant's device appropriates the principle and mode of operation of plaintiff's invention. *Baldwin Rubber Co. v. Paine & Willins Co.*, 99 F. 2d 1, 5; 39 USPQ 455, 458-459 * * *.

"Plaintiff's invention relates to improvement in an apparatus for dispensing steam in the treatment of fabric in the art of dry cleaning garments. The claims allowed therefor by the Patent Office are a new combination of previously known elements in a novel, new and useful manner, providing a unitarily controlled method of dispensing steam of varying water content, and instantaneously changing the same in the treatment of fabrics in the dry cleaning industry. Such is the scope of plaintiff's patent. *Gen. Motors Corp. v. Kesling*, 164 F. 2d 824 [76 USPQ 30]. Form is not of the essence thereof, hence the mathematical measurements and structural differ-

ence of plaintiff's invention compared with defendant's device is of little consequence to the issue of infringement charged. *Freeman v. Altvater*, 66 F. 2d 506 [18 USPQ 186]. The combination of claims in plaintiff's letters patent is the measure of plaintiff's invention. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405. Defendant's structure embodies every mechanism that is described in plaintiff's letters patent and each of the claims made therefor. If plaintiff's letters patent are valid, infringement is here present. *Lourie Implement Co. v. Lenhart, et al.*, 130 F. 122; *G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co.*, 115 F. 2d 958 [58 USPQ 4]; *General Ry. Signal Co. v. Great Northern Ry. Co.*, 43 F. 2d 790 [6 USPQ 314]; *Wisconsin-Minnesota Gas & Elec. Household A. Co. v. Hirschy Co.*, 28 F. 2d 838."

One of the greatest living exponents of patent law, Chief Judge Learned Hand of the Circuit Court of Appeals for the 2nd Circuit, in the case of *Philip A. Hunt Company v. Mallinckrodt Chemical Works*, 177 F. 2d 583; 83 USPQ 277, has favored the patent bar with a discussion of the law relating to substitution of equivalents as applied to combination claims. The following excerpts from the decision in that case are particularly applicable to the facts in the instant case:

"If the claims were limited to the 'concise and exact terms' in which the specifications ordinarily describe a single example of the invention, few, if any, patents, would have value, for there are generally many variants well-known to the art, which will at once suggest themselves as practicable substitutes for the specific details of the machine or process so disclosed. It is the office of the claims to cover these, and it is usually exceedingly difficult, and sometimes impossible, to do so except in language that is to

some degree 'functional'; for obviously it is impossible to enumerate all possible variants. Indeed, some degree of permissible latitude would seem to follow from the doctrine of equivalents, which was devised to eke out verbal insufficiencies of claims. Since by virtue of that doctrine a claim will cover whatever will accomplish substantially the same result by substantially the same means, it cannot be that a claim becomes invalid when it states expressly what the courts would in any event imply.

* * *

"Almost all inventions are combinations of old elements, whose selection as a new unit gives them their only importance. Their combination is the end or purpose of the 'invention': its 'nature and design' which the applicant must state. The elements of the combination are the means by which that 'nature and design' is realized; and nobody invades the patent who does not appropriate both end and means. To the extent to which variants, which will be serviceable as substitute means, are known to the art, and at once suggest themselves without need of further substantial experimentation, they are equivalents, and to extend the monopoly to them is not only justifiable but necessary to the protection of the inventor."

Plaintiff respectfully directs attention to the decision of the Circuit Court of Appeals for the 9th Circuit, in *R. W. Pointer, doing business as Pointer-Willamette Company v. Six Wheel Corporation*, 177 F. 2d 153; 83 USPQ 43, which affirmed the decision of the Honorable Claude McColloch, of the District Court for the District of Oregon, wherein District Judge Yankwich, speaking for the Circuit Court of Appeals, said:

"These elements combine to produce the same results,—flexibility, equal distribution of the load, avoidance of excessive wear,—which the patent in

suit first taught the art. Whether, as the court found, both were known as proper substitutes for the mentioned elements.—*Gould v. Rees*, 1872, 15 Wall. 187, 193,—or not, the court found correctly identity of structure on the ground of equivalency.” Citing authorities.

District Judge Clark, speaking for the Court of Appeals for the Ninth Circuit in *The Filtex Corporation v. Atiyeh*, 103 USPQ 197, found that there was but slight difference between the accused device and the device patented by the plaintiff. He held these slight differences to be immaterial, since the devices function in the same way to accomplish the same result. He cited the rule stated in the case of *Sanitary Refrigerator Company v. Winters, et al.*, 280 U.S. 30-42, 3 USPQ 40, 44, and quoted from that decision, as follows:

“except where form is of the essence of the invention it has little weight in the decisions of such an issue; and, generally speaking, one device is an infringement of another ‘if it performs substantially the same function in substantially the same way to obtain the same result. * * * Authorities concur that the substantial equivalent of thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape.’ *Machine Co. v. Murphy*, 97 U.S. 120, and see *Elizabeth v. Pavement Co.*, 97 U.S. 126-137. That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talcott*, 20 How. 402-405. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same device, performing precisely the same offices

with no change in principle, constitutes an infringement. *Ives v. Hamilton*, 92 U.S. 426-430. And even where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. Compare *Duff v. Sterling Pump Co.*, 107 U.S. 636-639."

The Prior Patented Art

During the prosecution of the application for the patent in suit, the Examiner cited but four prior patents as primary references and but three prior patents as secondary references. The record shows that the patent to Glass was cited against nine of the claims submitted; the patent to Gill was cited against five of the claims submitted; Atcheson was cited against but three of the claims; and Bates was cited against but one of the claims. Hedrick was used as a secondary reference to modify the structure of the primary reference cited against three claims, and Summers was used as a secondary reference to modify the structure of the Bates patent cited against one claim.

Certainly this does not reflect a "highly developed art", and the fact that the Examiner has made use of so few patents against so few of the claims leads us to examine these patents to determine whether specific limitations contained therein were required, or whether the court may nevertheless construe the claims with a scope commensurate with the invention.

The patent to Glass discloses a slide valve wherein a tubular casing A is provided with a groove within which the gate B is seated. A ratchet bar C is secured to the back of the gate or slide, indicating that the inlet is at the lower end of the casing as viewed in Figure 1. The gate or slide is equipped with inclined plates *z* which engage wedge shaped lugs *m-m* on each side of the back face of the gate and press the gate tightly against its seat. The gate or slide B is seated in opposition to the pressure of the fluid flowing through the valve, and in this respect is similar to single wedge type gate valves. The recess formed by the groove is on the outlet side of the gate, and, were the valve to be used to control the flow of pulp, the groove would fill with pulp and interfere with the operation of the gate. If the valve were used in a pulp mill and the flow of material reversed, the bonnet K would fill with pulp whenever the gate were closed and seriously interfere with the operation of the rack and pinion, and would hinder withdrawal of the gate from closed position. The Smith invention is not found in the Glass patent.

The patent to Gill discloses a wedge type gate valve wherein the wedge shaped gate 7 is moved in juxtaposition the seat 5 and then urged into seating engagement therewith by the wall 6. The flow of material through the valve is from inlet 3 to outlet 4, and the recess defined by a cutaway portion of the floor of the valve is on the outlet side of the gate. The face of the gate 7 does not scrape the seat 5, but, rather, is urged against the seat with a sudden movement after the gate is almost in wholly closed position. As stated by Mr.

Theodore J. Geisler, attorney for Smith during the prosecution of the application for patent, the groove 9 in Gill "is located on the outlet side of the gate, which, it is submitted, is not the equivalent of applicants' recess which is located on the inlet side of the gate, for the reason that Gill's recess would tend to form an eddy in which material would be liable to accumulate and to be pressed between the valve seat and the gate." There is no disclosure in the Gill patent which would teach Smith how to build the valve of the patent in suit.

The patent to Atcheson discloses a valve such as used to discharge the contents of paper-pulp digesters. The patent shows a box-like structure having a top H and bottom J, respectively. I and I' are openings through the top and bottom, I being the inlet port and I' the outlet port, respectively. F is the sliding gate which is pressed against the inner face H' of the top H of the casing. The gate is set in opposition to the pressure of the fluid flowing through the valve. E (there are two of them) are wedges or inclines mounted on the side walls of the casing to press the gate F into seating relation with the inner surface H' of the top H. Between the top and bottom walls is an area equal to the cubical area of the box, but which is on the outlet side of the gate. If the valve were set on end, the portion of this area below the level of the openings I and I' would form a groove as in the patent to Glass.

Insofar as claims 1 and 2 of the Smith application call for a housing having inlet and outlet ports and a gate between said ports slidable in said housing, the

patent to Atcheson is pertinent. But there is no recess in the floor of the Atcheson valve on the inlet side of the gate, such recess being inclined toward the gate in closed position, and the openings I and I' could be any shape.

The patents to Glass, Gill and Atcheson did not anticipate the structures of the claims against which they were cited. Our knowledge of the art proves these to be representative of the best art available to the Examiner. He cited the best art he had and left it to Smith or his attorney to show how the inventive concept was differentiated therefrom. It is true that it is up to the inventor to make claim to all that he believes himself entitled under the law, but where a claim includes a specific element in a specifically limited form, and such limitation is not required by the general terms of the patent nor by the state of the prior art, the Court may nevertheless construe the claim with a scope commensurate with the invention. *I. P. Morris Corporation v. S. Morgan Smith Co.*, 34 F. 2d 525.

The patents to Glass, Gill and Atcheson as primary references, and the patent to Glass as modified by Hedrick, were disposed of in applicant's response to the first Office action. These patents were not again urged against the claims pending in the application. From then on, having established patentability of the invention, Smith's attorney struggled to so phrase the claims as to avoid rejection on the ground that they were inaccurate or indefinite. The attorney's difficulty in this regard can be appreciated only by reading that portion of the file wrapper beginning with the second Office action.

Modification of Prior Art Structures

Of the prior patents introduced in evidence by the defendant, each of the following listed patents discloses a single wedge type gate valve having a gate with but one face which is seated in opposition to the flow of fluid through the valve,—which is the reverse of the flow of fluid through the Smith valve. A single asterisk after the patent indicates that it shows a full groove all the way around the valve opening. The double asterisk indicates that there is a recess in the floor of the valve on the *outlet* side of the gate. Both Mr. Edwards and Mr. St. George testified that this type of valve would not be acceptable for controlling the flow of pulp in a pulp mill.

Patentee	Number	Full Groove	Recess in Floor of Valve on <i>Outlet</i> Side
Belfield	105,027		**
Allt	233,180		**
Lunken	494,579	*	
Lunkenheimer	494,581	*	
Lunkenheimer	494,582	*	
Patterson	985,444		**
Snow	1,179,047	*	
Summers et al	1,379,136		**
Gill	1,613,509		**

With respect to the type of valve shown in the above listed patents, Mr. Paul Theiss, testifying for defendant, said:

“Q. (By Mr. Buckhorn): Mr. Theiss, does the patent specification disagree with you insofar as the intake and outlet sides are concerned?

A. Yes, it does. * * *

Q. But it is your opinion that any engineer confronted with and having at his disposition a valve of the type shown in the Gill patent would take the end marked B as the inlet end of the valve?

A. Yes."

Mr. Theiss testified three times that the inlet end of the valve shown in the Summers et al patent was at the right-hand end of the valve as shown in Figure 1 of the drawing (Transcript, p. 183). Upon constant urging by defendant's attorney, he agreed that the valve could be operated in the opposite way. But he further testified (p. 184) that the valve is a one-direction valve, and, if this is true, then the flow through the valve must be from right to left as viewed in Figure 1. The patentee so describes it, and says that the flap valve 18 is to prevent a return of the fluid (p. 2, column 1, line 25, of the patent).

Likewise, Mr. Theiss testified that each of the structures of the Belfield patent, the Patterson patent, and the Heinecke patent should be installed in a manner opposite to that described by the patentee, and that, if so installed, there could be found parts in respective ones of these patented valves which would be the full equivalent of certain elements of the Smith valve. It will be remembered that both Mr. Edwards and Mr. St. George testified that it would be impractical to reverse the operation of these valves by installing them backwards; but the point plaintiffs are making at this place is that, as stated by the Commissioner of Patents in the matter of the appeal of the party Gee, 261 O.G. 800 (1918):

"In order to negative invention in a novel combi-

nation it is necessary to find in the prior art not merely a device which might be modified to make this construction, but somewhere a suggestion, *not only that the modification ought to be made but how to make it.*" (Italics added.)

The language of the Commissioner of Patents is quoted with approval by the District Court of Connecticut in the case of *Kulp v. Bridgeport Hardware Mfg. Corporation*, 19 F. 2d 659 (1927), in which the court held that to negative invention in a novel combination it is necessary to find in the prior art, not merely a construction which might be modified to make the patented device, but a suggestion, *not only that the modification should be made*, but also how to make it.

The Circuit Court of Appeals for the 9th Circuit, in *Bankers Utilities Co. v. Pacific National Bank*, 18 F. 2d 16, held that anticipation is not made out by the fact that a prior existing device shown in a prior patent may easily be changed to produce the same result as that of the device of the patent in suit, where the prior device was in common use, *without it occurring to anyone to adopt the change suggested by the patent in suit.* To the same effect is the holding of the Circuit Court of Appeals for the 8th Circuit, in *Diamond Power Specialty Corporation v. Bayer Co.*, 13 F. 2d 337, 341, wherein the court said that in considering prior patents as anticipations, *it is not permissible to modify the structures of such patents, and then claim the modified structures as anticipations.*

The decision of the Court of Customs and Patent Appeals in *In re Lennie Wells*, 414 O.G. 4; 53 F. 2d 537;

11 USPQ 165, seems to be especially appropos in the instant case. The court said:

“It seems to have been the opinion of both the tribunals of the Patent Office that if the Pyles ratchet clutch were fitted to the Kammerdiner device, and should then be run backwards, appellant’s device was fully anticipated * * *. The portion of Pyles’ specification, heretofore quoted, plainly discloses that his device is intended to be rotated in one direction only.

“The appellant’s claims ought not to be rejected because of the possibility that if the Kammerdiner or Pyles devices were operated in some other manner, similar results would ensue to those secured by the use of appellant’s device. It is well said in *Topliff v. Topliff et al.*, 145 U.S. 156, 161: ‘It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.’

“An earlier device, which must be distorted from its obvious design, cannot be an anticipation. *Block v. Nathan*, 9 F. 2d 311.”

In the United States Patent Office, the final authority regarding the patentability of alleged invention is the Board of Appeals. Its decisions are final and conclusive, unless appealed to the Court of Customs and Patent Appeals, or a suit is brought in the Court of Appeals of the District of Columbia under the provision of R.S. 4915; 35 U.S.C. Title 35, Sec. 63. The language of the Board of Appeals in *Ex parte Halstead*, reported at 37 USPQ, page 417, is appropos in the instant case:

“Most inventions are based on known scientific

facts or involve the bringing together, in new combinations, of known elements, but invention is not negatived by a mere showing that the elements are old or by showing that the facts underlying the invention are old, unless it can also be shown that these elements or facts can be brought together in such a way as to produce the claimed invention. As above stated, we are not satisfied that the references here relied upon teach the invention claimed."

Aggregation of Prior Art Elements To Anticipate Invention

The prior art is in evidence to show what was available for defendant's use; but the courts are unanimous in saying that defendant is not permitted to select elements from prior art patents and combine them in the manner taught only by the plaintiffs' patent in violation of the plaintiffs' rights. To grant to a defendant the right to use patentee's teaching as to how to combine separate elements taken from prior art patents does violence to the very purpose and intent of the patent system.

The following extract is taken from *Johnson v. Forty-Second Street Railway Co.*, 33 Fed. Rep. 499; S.D.N.Y. 1888 (Patent No. 117,198 for a railway switch):

"The test to which this patent has been subjected—the test which is usually applied to all contested patents—is certainly severe, and is often misleading and deceptive. The defendant assembles every similar device, description, or suggestion in the particular art not only, but also in analogous, and even in remote arts. Everything which has the least bearing upon the subject is brought in and

arranged by a skillful expert in an order of evolution which resembles most closely the invention which is the subject of attack. Having thus reached a point where but a single step, perhaps, is necessary to success, and knowing from the inventor exactly what that step is, the expert is asked if the patent discloses invention, and, honestly no doubt, answers in the negative. There is always the danger, unless care is taken to divest the mind of the idea added to the art by the inventor, that the invention will be viewed and condemned in the light of ascertained facts. With his description for a guide, it is an easy task to trace the steps from the aggregation to the invention."

In *Bragg-Kliesrath Corp. v. Farrell*, 36 Fed. Rep. 2d 845 (CCA 2-1929), the Court, in upholding Dickson Patent No. 1,076,189, for a vacuum power brake, stated:

"It would reduce patent protection almost to a nullity if an infringer could, in the light of a subsequent disclosure, comb the prior art, and piece together portions of earlier patents, while dropping other parts, and thereby invalidate a new combination of old elements."

Defendant makes no use of any of the prior art valves. Although a very considerable number of valve patents have expired—all of which are available to whomsoever wishes to make use thereof—nevertheless, defendant copied plaintiffs' valve, and now seeks to excuse its acts by saying that the several elements can be found in the prior art.

Plaintiffs' Established Royalty as Measure of Damages

The pecuniary injury which a plaintiff incurs by reason of a defendant's infringement of his patent is the measure of the damages which that plaintiff is entitled to recover on account of that infringement. *Coupe v. Royer*, 155 U.S. 565, 582, 39 L. Ed. 263; *Goodyear v. Bishop*, 2 Fisher 154, 158, Fed. Cas. No. 5,559, C.C., N.Y.; *Graham v. Mfg. Co.*, 24 Fed. 642, 643, C.C. Wis.; *Brickill v. Baltimore*, 60 Fed. 98, C.C.A. 4. Such an injury is often called the plaintiff's loss. *Suffolk Co. v. Hayden*, 3 Wall. (70 U.S.) 315, 320, 18 L. Ed. 76; *Cowing v. Rumsey*, 8 Bltchf. 36, Fed. Cas. No. 3,296, C.C., N.Y.; *McColb v. Brodie*, 1 Woods 153, 161, Fed. Cas. No. 8,708, C.C., La.; *LaBaw v. Hawkins*, 2 Bann. & Ard. 561, 563, Fed. Cas. No. 7,961, C.C., N.J.; *Duplate Corporation v. Triplex Safety Glass Co. of N. A.*, 298 U.S. 448, 451, 80 L. Ed. 1274; *Beach v. Hatch*, 153 Fed. 763, C.C., Mass.

The existing statute for awarding damages for infringement of Letters Patent is 35 U.S.C. 284, which reads as follows:

"Sec. 284, Damages

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

"When the damages are not found by a jury the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

“The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances (R.S. 4919, 4921; 35 U.S.C., 1946 ed., 67, 70.)”

The magnitude of the loss sustained by plaintiff must always be ascertained, in order to ascertain the amount of the damages which he is entitled to recover. To ascertain the extent of the pecuniary injury which a particular infringement has caused a particular plaintiff, it is necessary to ascertain “the difference between his pecuniary condition after the infringement, and what that condition would have been if that infringement had not occurred.” *Yale Lock Co. v. Sargent*, 117 U.S. 536, 552, 29 L. Ed. 954. If he availed himself of his patent by granting licenses to others to do the things which the defendant did without a license, *then that difference consists in his not having received the royalty which such a license would have brought him.* *Seymour v. McCormick*, 16 How. (57 U.S.) 480, 489, 14 L. Ed. 1024; *New York v. Ramson*, 23 How. (64 U.S.) 487, 490, 16 L. Ed. 515; *Philips v. Nock*, 17 Wall. (84 U.S.) 460, 462, 21 L. Ed. 679; *Clark v. Wooster*, 119 U.S. 322, 326, 30 L. Ed. 392; *Tilghman v. Proctor*, 125 U.S. 136, 143, 31 L. Ed. 664; *Graham v. Mfg. Co.*, 24 Fed. 642, 643, C.C., Wis.; *Timken v. Olin*, 41 Fed. 169, 171, C.C., Ohio; *Con. Rubber Tire Co. v. Diamond Rubber Co.*, 232 Fed. 475, C.C.A. 2; *Empire Rubber & Tire Co. v. De Laski & Thropp Circular Woven Tire Co.*, 281 Fed. 1, C.C.A. 3; *Muther v. United Shoe Machinery Co.*, 21 F. 2d 773, 775, D.C., Mass.

The primary method of assessing damages for infringements of patents consists in using the plaintiffs' *established* royalty as the measure of those damages. *Clark v. Wooster*, 119 U.S. 322, 30 L. Ed. 392; *Seymour v. McCormick*, 16 How. (57 U.S.) 480, 14 L. Ed. 1024; *New York v. Ramson*, 23 How. (64 U.S.) 487, 16 L. Ed. 515; *Philip v. Nock*, 17 Wall. (84 U.S.) 460, 21 L. Ed. 679; *Tilghman v. Proctor*, 125 U.S. 136, 31 L. Ed. 664; *Graham v. Mfg. Co.*, 24 Fed. 642, C.C., E.D. Wis.; *Timken v. Olin*, 41 Fed. 169, C.C., S.D. Ohio, W.D.; *Con. Rubber Tire Co. v. Diamond Rubber Co.*, 232 Fed. 475, C.C.A. 2; *Empire Rubber & Tire Co. v. De Laski & Thropp Circular Woven Tire Co.*, 281 Fed. 1, C.C.A. 3; *Muther v. United Shoe Machinery Co.*, 21 F. 2d 773, D.C., Mass.

The courts have always held that *established* royalties are the best measure of damages in patent causes. There is no conflict among the decisions, nor has there been since early pronouncements of the United States Supreme Court. For example, see *Seymour v. McCormick*, 57 U.S. 481, 489, 14 L. Ed. 1024 (1853) where Mr. Justice Grier wrote the opinion for the Court:

"Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims anything above that amount he is bound to substantiate his claim by clear and distinct evidence."

In *Clark v. Wooster*, 119 U.S. 323, 326, 30 L. Ed. 392, the patentee, Wooster, brought suit against the firm of Johnson, Clark & Co. to restrain infringement of

patent and to recover profits and damages. The decree established infringement. Plaintiff adduced evidence to show that he had established a license fee of ten cents from each folding guide purchased or disposed of, and had granted licenses at that rate to divers sewing machine companies. Defendants alleged error in the court's finding that the measure of damages was an established license fee and that such fee was proved. Mr. Justice Bradley, speaking for the Court. said:

"The third point, as to the measure of damages, and the want of proof thereof, is equally untenable. It is a general rule in patent causes, *that established license fees are the best measure of damages that can be used*. There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant; and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subjects of allowance by the court, under the authority given to it to increase the damages.

"As to the sufficiency of the proof, we see no occasion to disturb the conclusion reached by the master on this point. The complainant proved several instances of licenses given by him to large sewing machine companies, the fees on which were regularly paid, and corresponded with the rate allowed by the master. We think that the defendants have no occasion to complain of the amount awarded." (*Italics added.*)

In *Faulkner v. Gibbs*, C.C.A. 9, 199 F. 2d 635, 95 USPQ 400, Bone, Circuit Judge, an infringement suit was brought on patent No. 1,906,260, issued May 2, 1933, for a game device. The suit was brought in the U. S. District Court of the Southern District of California before Judge Yankwich, who found the patent valid

and infringed. The Circuit Court of Appeals for the 9th Circuit affirmed the interlocutory judgment of the District Court, 170 F. 2d 34. The Supreme Court of the United States granted certiorari and affirmed, 338 U.S. 267; 70 S. Ct. 25; 94 L. Ed. 62. Rehearing denied, 338 U.S. 896; 70 S. Ct. 236; 94 L. Ed. 551. Plaintiff had granted ten licenses which produced annual royalties ranging from \$1000 to \$3600 per year on sixteen unit banks of machines. The annual unit royalties varied from \$20 to more than \$40. Some of the agreements recited that the licensees were bound by outstanding injunctions and some of the agreements were made in compromise out of pending infringement suits for past infringement. Two of the agreements were in effect when the defendant began his infringing operation.

These circumstances led the court to hold that the case was not one for application of the established royalty rule, but set forth the following:

“The statutory provision governing this question is 35 U.S.C.A. 70, the relevant portion of which is set out in the margin:

“ ‘ * * * and upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, and interests, as may be fixed by the court. * * * ’

Save for the omission of any reference to profits as a basis of recovery in infringement cases, this provision makes no change in the long-settled law on the subject. The infringement of a patent is a tortious taking, entitling the injured party to gen-

eral damages, measured ordinarily by the fair value of what was taken, i.e., the privilege of making, using or selling the patented article. *Where an established royalty for a license is proved, this is the best measure of the value of what was taken by the infringement.*

“In order that a royalty may be accepted as ‘established’ it must have been paid prior to the infringement complained of; it must have been paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have had occasion to use the invention; and it must have been uniform at the places where licenses were issued.

* * *

“Where no established royalty can be proved, it is permissible to show . . . what would have been a reasonable royalty . . .” (Italics added.)

In *Reliance Construction Co. et al. v. Hassam Paving Co. et al.*, C.C.A. 9; 248 Fed. 701, Gilbert, Ross and Hunt, Circuit Judges, suit was brought by Hassam Paving Co., a corporation of Massachusetts, the patentee of patent No. 861,650, and Oregon Hassam Paving Co., a corporation of Oregon, to whom the patentee had granted an exclusive license to use and to vend the right to use the patented invention within the state of Oregon, against defendants, alleged infringers.

The royalty charged by patentee was fifteen cents a yard for use of the patented process for laying pavement. The master found that a royalty of twenty-five cents a yard would be a reasonable royalty for recovery of damages. Defendants contend that the royalty charged by the patentee of fifteen cents per yard should be used

for computation of damages. The Court affirmed the master's findings and held:

"It is obvious that the sum charged by the patentee as royalty to auxiliary companies, who receive exclusive licenses for a designated territory, and who invest capital and incur the expense of preparing plants, and enter into the business of supplying the patented article, would be an inadequate royalty and measure of damages for infringement. The patentee, in consideration of the benefit which it obtains from the act of cooperation of an auxiliary company, in introducing the patented improvement and exploiting it, thereby securing a far greater return for the use of its invention than could be obtained by dealing with individual users, may well afford to fix a low rate of royalty to such licensees. For the infringer in this case to pay the licensee damages measured in the figures of a royalty of 15 cents would not meet the demands of justice.

"On a basis of 15 cents as a reasonable royalty for damages in this case, if the licensee is entitled to receive and retain the sum paid for damages, the patentee would receive nothing for the use of its patent. If, on the other hand, it is payable to the patentee, the licensee would receive nothing for the invasion of its exclusive rights under the license. We agree with the court below that the master's finding 'is as favorable to the defendants as they can reasonably ask or expect.' "

General Motors Corp v. Blackmore et al., presents a good summary of the doctrine of established and reasonable royalties. Circuit Court of Appeals, 6th Cir., 53 F. 2d 725; Hickenlooper, Circuit Judge. The case was brought on the law side of the court and was reversed. The court, however, discussed the measure of damages as follows:

"We accept the position that, where an 'estab-

lished royalty' is clearly shown, that is, a standard rate at which licenses were voluntarily and freely sold, such 'established royalty' must control; but this contemplates an absence of peculiar or special circumstances influencing any specific grant and an open, established market unaffected by attending relationships or collateral interests. Conceding that an 'established royalty' accurately reflects market value, and is the true equivalent thereof, licenses granted at other times, and between other parties, and upon private negotiations, as distinguished from sales upon an impartial basis, may be extremely helpful in determining the reasonable rate to be applied, but cannot be regarded as conclusive of market value. An exception to the general rate—the preferential treatment of one manufacturer, or even of a number of manufacturers who take out licenses—does not entitle an infringer to precise equality of treatment. The patentee may still recover such sum as would have been reasonable under all the circumstances of the case. And so, too, if there has been a general infringement, and the patent is in wide disrepute and openly defied, these individual and private compacts may even lose much of their probative force as indicating the reasonable royalty. This supposed condition of the market would not affect the amount of an established royalty, if such had been shown, even though it had caused such established royalty to be publicly fixed at a lower rate than would otherwise have been done; but that diminished royalty rate to which the patentee may have been driven in individual cases by the disrepute of his patent and the open defiance of his rights should likewise not be taken as the true measure of a reasonable royalty where no established royalty is shown. The reasonable royalty must still be determined from proofs of acceptance, utility, value, and demand, and upon the hypothesis that the patent was valid and would be respected. Compare *Consolidated Rubber Tire Co. v. Diamond Rubber Co.* (D.C. So. Dist. N.Y.—Judge Learned Hand), 226 F. 455."

Inadequacy of Damages Awarded by District Court

The District Court found that "a reasonable royalty of $1\frac{1}{2}\%$ of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952." Total sales by the defendant during said period was \$197,476.73 [Finding of Fact No. XVIII, p. 32, Transcript].

In 1938 a license was granted to Crane Company, and in 1939 a license was granted to Crane Company of Canada. These were exclusive licenses, save for the eleven Western states of the United States. Each of the licensees paid a royalty of 5% of the total sales price of the Smith valves. Crane Company advertised the valves in trade journals and magazines having nationwide distribution. Plaintiffs' Exhibit No. 21 was taken from a copy of Time Magazine published at about the time of the trial of this cause.

Defendant's infringing valves rode to market on the wave of popularity of the Smith valve. The structure was well known to the trade—every pulp and paper mill on the North American continent is equipped with Smith valves for controlling the flow of pulp. Defendant not only infringed the Smith patent but it also trespassed the exclusive rights of the several licenses. To borrow the language of the Court of Appeals for the Ninth Circuit in *Reliance Construction Co. et al. v. Hassam Paving Co. et al.*, 248 Fed. 701:

"For the infringer in this case to pay the licensee damages measured in the figures of a royalty of 15 cents would not meet the demands of justice."

Likewise in this case, the demands of justice are not fully met by assessing damages against the defendant in the figures of the royalty paid by the legitimate licensees; and the District Court surely erred in granting to defendant a pecuniary reward for its unlicensed appropriation of plaintiffs' property.

Damages in Figures of Royalty Paid by Western Machinery Company

On December 4, 1945, plaintiff Walter G. E. Smith entered into an agreement with Western Machinery Company whereby he appointed the Western Machinery Company the exclusive agent to manufacture and sell gate valves under the Smith patent No. 2,001,271 throughout the eleven Western states. The contract provided:

"2. First Party shall forthwith deliver to Second Party all of his drawings, patterns, specifications and other data applicable to the manufacture of said gate valves and hereby authorizes Second Party to use said property in connection with the manufacture of gate valves during the term of this contract. * * *

"6. Second Party agrees to pay First Party a royalty of twelve and one-half ($12\frac{1}{2}\%$) per cent of the net selling price of all gate valves sold by it.
* * *

The aforementioned agreement is plaintiffs' Exhibit No. 12. The District Court is in possession of evidence of the value of said drawings, patterns, specifications and other necessary and useful data applicable to the manufacture

of gate valves embodying the invention disclosed by patent No. 2,001,271.

Western Machinery Company agreed to pay a rental fee for the use of said drawings, patterns and specifications in the figures of a royalty on sales of said gate valves of $7\frac{1}{2}\%$ [Finding of Fact No. XX]. This was in addition to the royalty of 5% which Western Machinery Company paid for the right, license and privilege of manufacturing and selling the Smith valve.

The judgment of the District Court makes no award of any damages whatever for Smith's loss of rental fees caused by the trespass by defendant on the exclusive rights of licensee, Western Machinery Company. The loss of these rental fees is the pecuniary injury which the plaintiff Smith suffered by reason of defendant's infringement of his patent, and is the measure of damages which Smith is entitled to recover on account of that infringement. Smith availed himself of his patent by granting licenses to others to do the things which the defendant did without a license. The difference between Smith's pecuniary condition after the infringement and what that condition would have been if the infringement had not occurred consists in his not having received his share of the royalties which his license to Western Machinery Company should have brought him. If these damages may be assessed by using Smith's established rental fee as the measure of these damages, then Smith is entitled to recover from defendant $7\frac{1}{2}\%$ of the amount of defendant's sales in the eleven Western states, to-wit: $7\frac{1}{2}\%$ of \$179,617.93, which amounts to \$13,471.34.

CONCLUSION

The Smith structure was a new type of valve produced for a large and important industry as a solution for a troublesome problem. It was unlike any valve used by that industry before the summer of 1930. It was not a double wedge-type gate valve nor yet a single wedge-type gate valve, and certainly was not a plug-type valve, nor a Reed valve having a piston and cylinder construction. And, since it was not one of these types of valves, it cannot be classified as an improvement therefor.

The Smith valve is unlike anything produced by the prior art, so is not an improvement for anything to be found in the prior art. The patent is a pioneer patent, in that its structure is the first of its kind ever made available to the users of valves. As was said by the Supreme Court in *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U.S. 399, 25 S. Ct. 697, 700:

"It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, * * *."

All the structural features of plaintiffs' valve, which differentiate it from the valves known and in use prior to December 3, 1930, have been appropriated by the defendant as the essential features of the infringing valves.

There is substantial identity, constituting in-

fringement, where a device is a copy of the thing described by the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing." *Burr v. Duryee*, 1 Wall, 531, 573.

"Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and generally speaking, one device is an infringement of another 'if it performs substantially the same function in substantially the same way to obtain the same result.' " *Machine Co. v. Murphy*, 97 U.S. 120, 125.

"A close copy which seeks to use the substance of the invention and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an ^{INFRINGEMENT} invention." *Ives v. Hamilton*, 92 U.S. 426, 430.

These pronouncements, found in early decisions of the Supreme Court of the United States, remain the law of the land to the present date. Defendant's differences in form, with no differences whatever in function or in relation to each of the other elements of the combination, constitute only "such variations as are consistent with its being in substance the same thing." Let the Honorable Court be not persuaded that parallel rings are otherwise than "grooves formed in the side walls of the housing", and that the cutaway portion of the ring on the inlet side of the gate constitutes anything other than "cavities connecting with said grooves in which to receive the material scraped off by the gate while being

closed." The "transverse wall" in the Smith patent is a *seating ledge* in defendant's valve, and without any new or unusual function attributable to a particular shape of opening, an opening of any one shape is the equivalent of an opening of any other shape in these valves. The location, purpose and function of these and other essential elements are the same in plaintiffs' and defendant's structures.

To warrant a decision in favor of defendant will require that the Honorable Court find that plaintiffs' patent is of extremely narrow scope and that its range of equivalents is nil. In view of the fact that only ten out of the twenty-six claims submitted during prosecution of the application for Letters Patent were rejected on any art whatsoever, and that it was incumbent upon patentee (acting through his attorney) only to so word the remaining claims as to avoid the Examiner's objections that they were indefinite or inaccurate, it is clear that the record does not support defendant's contention that the file wrapper establishes that the invention is but a narrow improvement and not entitled to the benefit of the law relating to substitution of equivalents.

Plaintiffs respectfully contend that in equity and justice plaintiffs are entitled to judgment against defendant for wilfull infringement of the Smith patent, No. 2,001,271, and that plaintiffs recover damages in figures of royalties computed as follows:

For the United States National Bank of Port-

land, Oregon, Trustee, 5% of \$197,476.73 . \$ 9,873.84

For Walter G. E. Smith, $7\frac{1}{2}\%$ of \$179,617.93 . 13,471.34

Total damages \$23,345.18

Respectfully submitted,

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH,

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United States
COURT OF APPEALS
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH, *Appellants,*
vs.

FABRI-VALVE COMPANY OF AMERICA, a
corporation, *Appellee.*

FABRI-VALVE COMPANY OF AMERICA, a
corporation, *Appellant,*
vs.

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH, *Appellees.*

**BRIEF FOR DEFENDANT-APPELLEE
AND CROSS-APPELLANT**

*Appeals from the United States District Court for the
District of Oregon.*

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FILED

JAN 29 1955

PAUL P. O'BRIEN,
CLERK

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vs.

THE UNITED STATES NATIONAL BANK
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WALTER G. E. SMITH, *Appellees.*

BRIEF FOR DEFENDANT-APPELLEE
AND CROSS-APPELLANT

*Appeals from the United States District Court for the
District of Oregon.*

JURISDICTION

The jurisdiction of the District Court in this action for patent infringement is based upon the patent laws of the United States of America (R. 4).

This Court's jurisdiction to review the Final Judgment (R. 35) arises under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Plaintiff-Appellants appeal from a judgment (R. 35) awarding damages for infringement of claim 3 of the patent in suit, which was entered upon two Oral Opinions (R. 19 and R. 22) and Findings of Fact and Conclusions of Law (R. 24). The amount of damages is set forth as the error in Plaintiff's Notice of Appeal (R. 37), but in Plaintiff's Statement of Points on Appeal (R. 42) additional errors are set forth, including the Court's holding of noninfringement of claims 1, 2, 5 and 6 of the Smith patent. Defendant-Appellee filed a Notice of Appeal (R. 40) and Statement of Points on Appeal (R. 42) with respect to the Court's finding of infringement of claim 3 of the patent in suit.

The District Court for the District of Oregon held that Patent No. 2,001,271 in suit was not infringed as to claims 1, 2, 5 and 6, and was infringed as to claim 3 (R. 34). The patent in suit was issued May 14, 1935, and expired May 14, 1952, prior to conclusion of the trial. The validity of the patent was not an issue of the trial. The sole issues on appeal are infringement and the amount of damages. Claim 4 of the patent in suit has never been at issue, the charge of infringement being limited to claims 1, 2, 3, 5 and 6 (R. 19).

Two different types of valves manufactured by defendant are charged with infringement, the bonnet type (Type A) (D. Ex. D., Plate 2) and the bonnetless type (Type B) (D. Ex. D., Plate 3). These two types of valves are described in general terms in Findings VII

to X (R. 27). The valve illustrated in the patent in suit is also illustrated in D. Ex. D., Plate 1, and described in Finding VI (R. 26).

The gate valve of the patent in suit is designed particularly for use in pulp mills and more particularly for controlling the flow of pulp stock through pipelines (Finding V, R. 26). According to Finding XI (R. 29), gate valves were highly developed by the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit.

ANALYSIS OF THE CLAIMS

The elements of the claims are set out below, together with appropriate comments.

1. All claims call for a "housing provided with inlet and outlet ports." It is undeniable that all valves have a housing provided with inlet and outlet ports;

2. All claims call for a "gate slidable between said ports." The gate is designated by the letter h in the patent. The gates of defendant's valves are designated by the numeral 14 in Plates 2 and 3 of D. Ex. D. Gate valves were highly developed long prior to the Smith patent;

3. All claims specify that the gate is slidable "in grooves formed in the side walls of said housing." These grooves are designated by the small letter g in the patent. In defendant's valve Type A (Plate 2) the gate is guided between a ring 15 welded to the inner surface

of the wall of the valve body on the outlet port side and a similarly situated partial ring 16 on the inlet port side. A guideway is thus formed, but not "grooves formed in the side walls of said housing." The gate is guided in defendant's valve Type B (Plate 3) between the annular shoulder 15 formed by the smaller diameter portion of the welded valve housing on the outlet port side and the larger diameter portion of the inlet port side of the valve housing; which likewise is not "grooves formed in the side walls of said housing." Having the grooves formed in the side walls is an important feature of Smith's valves since, as seen most clearly in Fig. 5 of the patent, the walls of the valve body are not obstructed by protruding rings as in defendant-appellee's valves (D. Ex. D., Plates 2 and 3). In defendant-appellee's valves the rings 15 and 16 in Type A, and the inwardly protruding portions 15 of part 22 and 16 of part 21 in Type B, constrict the passages and create turbulence;

4. Claims 1, 2, 5 and 6 state that the side walls of the inlet side of the valve are provided "at the bottom with cavities connecting with said grooves." These cavities in the bottoms of the side walls and connecting with the grooves are designated by the small letter m in the Smith patent. These recesses are formed into the side walls of the valve as seen most clearly in Fig. 5 of the patent. There is no corresponding structure in either type of defendant's valves. This express limitation is found in each of claims 1, 2, 5 and 6, together with the following statement of purpose thereof, "in which to receive the material scraped off by the gate while

being closed.” The recessing of the side walls in this manner is necessary because the grooves in the unobstructed side walls of the valves provide quiet areas in which deposits build up, and these grooves extend in a straight line from top to bottom of the valve so that considerable deposits are formed. This important element of the claimed combination and its function is not present in either type of defendant’s valves. The Court correctly found that such “cavities” are essential elements of claims 1, 2, 5 and 6, and that these claims were not infringed;

5. Claims 2 and 6 are further limited to “the floor of the inlet side of the housing inclining downward toward the cutting edge of said gate when in closed position.” This element is not present in defendant’s gate Type A. It is present in defendant’s gate Type B;

6. Claims 3, 5 and 6 contain the following limitation: “a transverse wall separating the inlet and outlet ports,” The words “transverse wall” are not found in the specification of the Smith patent. However, it is clear that Smith is referring to the wall portions 1', as described in page 1, column 2, line 53, and page 2, column 1, line 10 of the patent. This transverse wall is recited *in addition to the grooves formed in the side walls of the valve housing*;

7. Claims 3, 5 and 6 also include the following: “such wall provided with an opening, the gate sliding against said wall, the lower end of said opening formed V-shape,”. Again, no exactly equivalent wording is found in the specification of the Smith patent, but it is certain

that reference is being made to the peculiar formation of the outlet port f as being "V-shaped at the bottom, as at 1," (page 1, column 2, line 50, to page 2, column 1, line 15). No equivalent V-shaped bottom of the outlet port is present in either of defendant's valves. Emphasis is placed on the fact that there are present in these claims the three separate elements of grooves in which the gate is guided, a wall against which the gate slides, and a V-bottomed opening in the wall.

The foregoing conclusions with respect to the meaning of the claims are supported by the phrases found in each of these claims, as follows: "the gate sliding against said wall" and the dual functional statement "whereby said wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, and the cutting edge of the gate makes relatively an oblique cut through the material located in said opening."

THE COURT'S ERROR

The Court incorrectly decided that the cylindrical outlet port body portions of defendant's valves, being circular in cross-section, were U-shaped at the bottom. *A semicircle is not U-shaped.* The Court erroneously concluded that, since claim 3 was not limited to the "cavities", and since a "V" and a "U" are sometimes interchangeably used in printing and inscriptions (Opinion, R. 21), (Opinion, R. 23), (Finding XII, R. 30), claim 3 was therefore infringed. (Judgment II, R. 35).

The Court erred in broadening the scope of claim 3 and thus finding equivalency, since the Court overlooked the fact that these express limitations were necessary to define over the prior art, and overlooked the abandonment of claims urged during the prosecution of the application which could have been entitled to broader interpretation, and other factors.

THE FILE WRAPPER AND CONTENTS

Claims originally presented by Smith were rejected in the first Office action dated April 15, 1931, on prior art including the patents to Glass, Gill, Atcheson, Hedrick and Mawby (D. Ex. B1, B2, B3, B4, and B5). At the bottom of the first page of the first official action, the Patent Office Examiner made the following statement (D. Ex. A., page 17):

“Claims 6, 7 and 8 are rejected as lacking invention over Gill, who shows the gate guide grooves cut away for the purpose of preventing accumulation of debris, and to use such means on the inlet side would realize no new or unexpected result.”

The original claim 7, rejected above, appears on page 11 of the file and reads as follows:

“7. In a gate valve, the combination of a housing having opposite inlet and outlet ports, a gate located between said ports and slidable in the housing, said gate being beveled on the inlet side at its lower edge, a recess in the floor of said housing on the inlet side of said gate, said recess gradually increasing in depth to said gate and extending laterally whereby the walls of said side groove of the gate are cut away by the recess on the inlet side, and means for operating said gate.”

This claim therefore clearly and definitely defines a structure including the housing, a knife-edged gate guided in the housing, the recess defined by the sloping bottom indicated at J in the Smith patent, and the cavities indicated at m in the Smith patent.

Pursuant to the first Office action, Smith filed an amendment in which he cancelled claims 1, 2, 3 and 6 to 11 inclusive, and added a new series of claims, all of which were limited as in the patent claims. In the argument appended to the first amendment and beginning on page 22 of the file (D. Ex. A), Smith distinguished the structure of the patent application over the prior art. Particular attention is directed to one sentence appearing slightly below the center of page 23, and reading as follows: "Gill shows a semicircular valve seat and obviously there is no scraping action as the gate closes on it." In these words Smith's attorney disclaimed any rights with respect to a gate valve having a semicircular seat at the bottom. The claims are thus expressly limited to a valve having a clearly defined transverse wall in which there is a V-bottomed opening. Moreover, on page 24 of the file the following additional statement was made by Smith: "The patent to Hedrick, 988,777, shows a gate valve having a rectangular opening in which the gate is slidable and, *while the bottoms of the grooves are cut away*, no recess is provided in the floor of the valve housing *nor is the outlet side formed V-shaped at the bottom.*" (Italics ours). Again, Smith's attorney pointed out in no uncertain terms that he was not making any claim to a valve having a round opening on the outlet side of the gate. The significance of the

V-shaped opening is stressed in Smith's specification beginning on page 1, column 2, line 50, and continuing to page 2, column 1, line 10 of the patent. Further than that, Smith, in describing the improvement which he had devised, admitted that gate valves with cylindrical outlet ports were old (patent page 1, column 1, lines 16 to 24). Therefore, even though the arguments presented in behalf of the claims which were finally allowed are overlooked, the fact that Smith cancelled claims readable upon cylindrical outlet ports is overlooked, and the express limitations of the claims and statements of the functions performed by the expressly defined parts are overlooked, the Court is nevertheless clearly in error since the Court's broad interpretation of claim 3 is barred by the positive disclaimer in the specification of the patent.

Claim 3 of the patent expressly stipulates "the lower end of said opening formed V-shaped, whereby said wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, and the cutting edge of the gate makes relatively an oblique cut through the material located in said opening." In this respect claim 3 of the patent closely resembles original claims 3, 4 and 5 of the application as filed, and which were allowed in the first Office action by the Examiner. Original claims 3, 4 and 5 all refer specifically to the V-shaped bottom on the outlet side of the gate. In order for the original claims 3, 4 and 5 to have been found allowable, they must have recited certain structural features which were not present in the rejected claims which were cancelled. In other words, claim 3 of the

patent depends entirely for its allowability and validity upon the specific stipulation of the transverse wall and the lower surface of the valve outlet opening being formed V-shaped, in addition to any means forming grooves to guide the gate.

TESTIMONY OF THE INVENTOR

Mr. Smith, the inventor, and a witness for plaintiff, testified (R. 77) that his first valves were provided with round outlet openings, and that the pressure of the fluid bowed the gate and caused it to shave the surface of the seat of the valve. He testified that when he made the bottom with a V-shaped section (as disclosed in the patent) there was no wear on the valve seat (R. 78). Mr. Smith admitted that gate valves which he had experimentally built prior to providing the transverse wall and the V-shaped bottom, and which were provided with rectangular gates, were noted to have the gates bowed toward the valve seat and their edges turned (R. 85-87). He testified that there was attrition of the valve seat which was avoided by changing the shape of the opening to a V-shape (R. 87).

COMPARISON OF PLAINTIFF-APPELLANTS' PATENTED VALVE AND DEFENDANT- APPELLEE'S ACCUSED VALVES

The two types of valves manufactured by defendant-appellee are correctly described in Findings of Fact VII and VIII (R. 27, 28). These agreed facts include the

fact that the gates are provided with semicircular, lower ends which are beveled for the purpose of scraping accumulated pulp stock from the face of the seating ledge. This type of valve is admitted by the patentee to be old in the specification of his patent (patent page 1, column 1, lines 16-24), was disclaimed in the prosecution of the patent (D. Ex. A., pages 22-24), and does not present the problem for which Smith was forced to design the transverse wall with the V-bottom opening.

The reason that Smith was forced to provide the transverse wall in addition to the guiding grooves in the sidewalls of the housing, is as follows. The gate in Smith's patent is rectangular. When such a gate is lowered to a point immediately above a straight, horizontal seating ledge in the bottom of the valve, the entire surface of the gate is subjected to the fluid pressure in the conduit. This means that the central portion of the sharp edge of the gate may be bowed considerably toward the outlet side of the valve, resulting in the shaving of the seating ledge and turning of the gate edge about which Smith testified in court (R. 77, 78). Defendant-appellee's gates, on the other hand, being semicircular, and being supported at the sides by circular rings or equivalent, do not present this problem. In such a construction the space between the lower semicircular edge of the gate and the lower semicircular surface of the valve body is a crescent with its points upward and at the same level. This crescent is constantly reduced in size as the gate is lowered. The extent of engagement of the side edges of the gate with the guiding ring increases progressively as the gate is lowered. The unsupported,

lower edge of the gate between the points of the crescent progressively diminishes in width as the gate is lowered. This means that the gate may be brought to its closed position without the ledge being shaved or the lower edge of the gate being turned.

Furthermore, Smith strove for and developed a valve capable of withstanding high pressures, up to 150 pounds per square inch (Smith's testimony, R. 87. See also Smith's testimony, R. 70-72, 77). He later found that such high pressures would rarely be encountered, and in fact the usual pressures were under thirty pounds (R. 87). But the fact remains that the patent was granted on features which Smith developed to withstand high pressures. Defendant's valves, on the other hand, were designed for the usual low pressures. All that defendant did was to rearrange or reassemble desirable features of low pressure gate valves found in the prior art as exemplified by the Gill patent of 1927, the Summers patent of 1921, the Snow patent of 1916, and the Hedrick patent of 1911. The Court was correct in finding that "The defendant's valves are not Chinese copies of the patented structure." (Oral Opinion, R. 22-23). Defendant's witness Thiess testified that valves of the Hedrick patent type were in common use for pulp control as early as 1929 (R. 92, 93) and that such valves had substantially all of the features of the Hedrick valve except the cavities 10 in the side walls (R. 94). This was unrefuted. The use of the cavities of the Hedrick patent was freely open to the public even then because the Hedrick patent had expired in 1928.

Defendant-appellee's valves, therefore, not only do not have structure equivalent to or corresponding to the transverse wall with the V-bottom opening, but have never had any need for such a construction or any equivalent construction. Thus, one of the principal elements upon which the Smith patent was allowed is not present and there is no necessity for its being present. Smith is now trying to assert inclusion within the scope of his patent of the structure which he admitted to be old prior to his patent, and which never did have the problem which he solved in providing the transverse wall with the V-bottom opening.

ARGUMENT

It is axiomatic in patent law that a claim is to be read in connection with the specification, and where the claim uses broader language than the specification, reference may be had to the latter to limit the claim. *Schnitzer et al. dba Alaska Junk Company v. California Corrugated Culvert Company et al.*, C.A. 9 (1944), 140 F. 2d 275. The foregoing decision is also quoted in regard to the following:

“While it is the rule in this Circuit that admissions made by the applicant to the Examiner are not to be used to narrow the scope of his claim *unless he has made changes in his application pursuant to the Examiner's suggestions*, yet the proceedings may be used to aid in construing the claim, (Warren Bros. Co. v. Thompson, 9 Cir., 293 F. 745.)” (Italics ours)

It is believed that the foregoing is true of the practice in the Ninth Circuit as of today. Smith made such changes.

The claim is to be read in connection with the specifications. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 432; *American Fruit Growers v. Brogdex Co.*, 283 U.S. 1; *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211. Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim. *McClain v. Ortmyer*, 141 U.S. 419; *Magnavox Co. v. Hart & Reno*, 9 Cir., 73 F. 2d 433; *Lanyon v. M. H. Detrick Co.*, 9 Cir., 85 F. 2d 875.

It is directly in point that the Ninth Circuit Court said the following in *Schnitzer et al.*, *supra*:

"The file wrapper contains evidence that the inventor understood this element of his claim in the narrower sense. During the proceedings before the Patent Office, two of the claims were rejected on Anderson, No. 811,812, and the inventor undertook to differentiate Anderson's invention, saying: 'Anderson . . . does not show a packing having a flanged clamp in the sleeve.' Anderson employed a U packing fitted into a seat similar to the one found in Appellants' device."

In the recent Ninth Circuit decision, *Kwikset Locks, Inc. v. Hillgren*, decided February 3, 1954, and reported at 100 USPQ 289 (Advance Sheet), the foregoing principles with relation to infringement received confirmation as follows:

"The District Court further found that the knobs manufactured and sold by Hillgren infringed Kwik-

set's doorknob patent in that they were mere 'colorable variations' and 'mechanical equivalents' of Kwikset's invention. While it is true that a District Court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous. 'it is [also] well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law, depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. The testimony in this case was largely expository and descriptive of the elements and operation of the two processes and was not disputed.' *Kemart Corp. v. Printing Arts Research Lab. Inc.*, 9 Cir., 1953, 201 F. 2d 624, 627, 628; *United States v. Esnault-Pelterie*, 1938, 303 U.S. 26, 30.

"In the Hillgren knob the edge of the shell does not curl, but rather directly faces the insert. See diagram in margin. Thus the 'curl' or 'annular portion' which is a distinguishing characteristic of the Kwikset knob, is absent from the Hillgren knob. - - - The Kwikset knob patent is in a crowded field; therefore, its scope must be narrowly limited. Since the Hillgren knob construction is based solely upon the tongue-in-groove principle in such a way as to eliminate the need for spring-back pressure employed in the Kwikset knob to hold the cap in place, we conclude that the Hillgren knob does not infringe the Kwikset patent."

The Court correctly found that gate valves were highly developed in the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit (R. 29); that claims 1, 2, 5 and 6 of the patent in suit are limited to cavities in the side

walls of the body communicating with the grooves, which cavities are not present in either of the valves of the defendant (R. 29); and that the patent was entitled to a very narrow range of equivalents (R. 30). But the Court incorrectly ignored the principles set forth in the above-cited decisions of this Circuit, the United States Supreme Court and other Circuits, in construing claim 3 (R. 30). The entire record of the patent, including cancellation of claims not limited to a transverse wall with a V-bottom opening, the specification of the patent as filed, and the arguments in the amendments, clearly shows that Smith understood his claims to be limited strictly to a V-shaped opening in a transverse wall, in addition to any means forming grooves at the sides. The transverse wall with its V-bottom opening, is an element entirely lacking from defendant-appellee's valves, equivalent structure is not present in defendant-appellee's valves, and there is no need for such structure since its function is not necessary. Accordingly the finding of the Court with respect to claim 3 is clearly erroneous and should be set aside.

DAMAGES

Finding of Fact XII expressly acknowledges that ordinarily the Court would consider other contracts entered into by the claimants as a proper standard upon which to determine a reasonable royalty. The Court, however, set a very low royalty "in view of the facts hereinbefore set forth and the fact that the patented structure represented only a minor improvement in a

highly developed art" (R. 30). This is likewise a finding that may not be set aside unless clearly erroneous. Defendant-appellee contends that the Court's statement that the patented structure "represented only a minor improvement in a highly developed art" is correct, and therefore the finding of infringement with respect to claim 3 should be set aside. Nevertheless, in the event that the finding of infringement is sustained, defendant-appellee believes that the Court was clearly within its rights in setting the rate of damages, and the amount of damages should not be disturbed. *Uihlein v. General Electric Co.* (C.C.A. 7), 47 F. 2d 997; *Horvath v. McCord Radiator and Manufacturing Company et al.* (C.C.A. 6), 100 F. 2d 326, c.d. 308 U.S. 581, 84 L. Ed. 486.

Although there is some evidence of higher royalties being specified in previously granted licenses, the evidence is to the effect that the royalty was not uniform, and therefore the established royalties cannot be used as a basis to prove damages. *Rude v. Westcott*, 130 U.S. 152, 167. A single license is not sufficient to establish a royalty, because one purchaser may give a larger sum for a license than he or any other person could well afford to pay, whereas such a business error is not likely to be made by a considerable number of persons when buying licenses under the same patent. The unanimous acquiescence of a considerable number of men in a particular royalty is evidence of its substantial justice, while the acquiescence of one only of the same men would have no convincing force. *Muther v. United Shoe*

Machinery Co., 21 F. 2d 773, 775. *Walker on Patents*, Deller's Edition, Section 823.

Furthermore, the efforts of plaintiffs-appellants to show that there were three licenses at five per cent (5%) of the total sales price of the gate valves were misleading, there being actually only one license under the United States patent at that royalty rate, namely the license to Crane Company of America at Chicago, Illinois. The license to Crane Company of Canada at Montreal, Canada, should be considered as part of the same transaction since the two are related companies, and in any event should not be considered as establishing a uniform royalty by two licenses under the United States patent since the license was limited to Canada. The fact that Western Machinery Company of Portland, Oregon, also apparently agreed to pay five per cent royalties is not to be taken as establishing two United States licenses at five per cent, since the five per cent royalty is only part of a twelve and one-half per cent charge imposed on Western Machinery Company, of which five per cent was stated to be for patent royalties and seven and one-half per cent stated to be for rental of drawings, patterns, specifications and other data applicable to the manufacture of gate valves. It is quite usual for licensors to grant the right to use drawings, patterns, specifications and other data, but usually there is no division of the royalty into so much for patent royalty and so much for rental of the latter items. At best, the situation is established that there were two effective licenses under the patent in suit, one specifying five per cent royalties and the other specifying twelve

and one-half per cent royalties, and these licenses furthermore were limited to different parts of the country.

Ordinarily the requirement of uniformity excludes from consideration all such licenses as were given at variant rates, for no better reason than variant ability on the part of the licensees to negotiate for a license or to resist a suit for infringement. *United Nickel Co. v. Railroad Co.*, 36 Fed. 186, 190. In *American Sulfito Pulp Co. v. De Grasse Paper Co.*, 193 Fed. 653 (C.C.A. 2) the lowest royalty was arbitrarily adopted as the basis of damages, and in *Horvath v. McCord*, supra, the Court arbitrarily set a rate lower than the proven uniform rate.

PLAINTIFF-APPELLANTS' BRIEF

Defendant-appellee has carefully read the brief of plaintiffs-appellants and believes that the foregoing completely meets and answers every bona fide argument advanced therein. Attention is called to the attempt therein to distort terms used in the claims to read on the accused valves (pages 10-11), and the statement on page 10 that "Defendants' gate valve bonnetless type B is substantially a Chinese copy of the Smith valve." The facts are otherwise, as the lower Court expressly found (R. 22-23).

Also, plaintiff-appellants' attempted distortion of the Smith patent relative to the cavities m in the side walls (Brief pages 26-28) is clearly refuted by Fig. 5 of the Smith patent.

Attention is also called to plaintiff-appellants' efforts, in pages 16-20 of the Brief, to create the impression that the patent actually covers something other than it does. Contrary to pages 16 and 17, gate valves in which pressure seated the valve on the outlet side were long known (Hedrick patent), and which had knife edges (Brooks patent). Where, in the patent claims, is there any reference to the length of the gate valve, or stuffing boxes, or bonnets, as described in page 19? And no mention is made of several express limitations of the claims, such as, for example, "opening formed V-shape."

In fact the brief, very significantly, discusses the *objects* of the patent, advantages of the valve *illustrated* in the patent, and portions of the *specification* of the patent; but *does not advance a solitary argument based upon the claims of the patent*. *Schnitzer et al. v. California Corrugated Culvert*; *Warren Bros v. Thompson*; *Carnegie Steel v. Cambria Iron*; *American Fruit Growers v. Brogdex*; *Schriber-Schroth v. Cleveland Trust*; all *supra*.

CONCLUSIONS

1. The Court was clearly erroneous in finding infringement of claim 3, and this finding should be set aside;

2. The Court was clearly correct in finding non-infringement of claims 1, 2, 5 and 6, and this finding should be sustained;

3. In the event that infringement is found, the findings of the Court as to the amount of damages should not be disturbed.

Respectfully submitted,

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No. 15724 ✓

United States
Court of Appeals
for the Ninth Circuit

FRED C. NIEDERKROME, E. ROYCE, DORA
F. ROYCE, EZRA ROYCE, B. ROYCE,
ESTATE OF ISABELLE H. ROYCE, DE-
CEASED, B. Royce, Executor, ROBERT T.
JACOB, AGNES C. JACOB, ALBERT L.
SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 312, inclusive)

Petitions to Review Decisions of The Tax
Court of the United States

FILED

DEC 11 1957

No. 15724

United States
Court of Appeals
for the Ninth Circuit

FRED C. NIEDERKROME, E. ROYCE, DORA
F. ROYCE, EZRA ROYCE, B. ROYCE,
ESTATE OF ISABELLE H. ROYCE, DE-
CEASED, B. Royce, Executor, ROBERT T.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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—cross 577

Royce, E.

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The Tax Court of the United States

Docket No. 51491

FRED C. NIEDERKROME, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1953

Dec. 15—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 17—Copy of petition served on General Counsel.

Dec. 15—Request for Circuit hearing in Portland, Oregon filed by taxpayer. 12/30/53, granted.

1954

Feb. 15—Answer to petition filed by General Counsel.

Feb. 16—Copy of answer served on taxpayer, Portland.

1955

Feb. 15—Hearing set May 9, 1955, Portland, Oregon.

May 12, Hearing had before Judge Van Fossan on 14, the merits. Petitioner's oral motion to 16—consolidate dockets 51491, 51526 to 51529, incl., 51531, 51533 — no objection by respondent—granted; petitioner's oral mo-

1955 (Con't.)

tion to file stipulation of facts later with respect to specific issues — granted, and stipulation of the parties to take deposition — granted — to be taken within ten days. Entry of appearance of Randall S. Jones, Esq. and Stipulation of Facts with Exhibits 1 through 13, B through T, attached, Exhibits A later attached to stipulation, filed at hearing. Petitioner's Brief, 7/15/55; respondent's brief, 8/29/55; petitioner's reply, 9/28/55.

May 23—Motion for leave to withdraw the original of each subpoena Mrs. Fannie Orsen et al. filed by General Counsel.

Jun. 1—Respondent's motion of 5/23/55 is granted.

Jun. 2—Motion to withdraw exhibits 12, 13, 16, 19, 22, 23, 24, 27 and 32 to 44, incl., filed by taxpayer. 6/3/55, granted.

Jun. 9—Transcript of Hearing 5/12/55 filed.

Jun. 9—Transcript of Hearing 5/14/55 filed.

Jun. 9—Transcript of Hearing 5/16/55 filed.

Jul. 5—Motion for extension to 8/15/55 to file brief filed by taxpayer. 7/5/55, granted.

Aug. 15—Brief filed by taxpayer. Copy served.

Sep. 6—Motion for leave to file settlement stipulation in respect of certain issues, stipulation relative to disposition of certain issues lodged, filed. 9-7-55, granted.

Sep. 26—Motion for extension to Oct. 31, 1955 to file brief and November 30, 1955 to file

Sep. 26—petitioner's reply brief filed by General (Con't). Counsel. 9/27/55, granted.

Oct. 25—Joint motion for extension to Nov. 18, 1955 to file respondent's brief and to Dec. 30, 1955 to file petitioner's reply brief filed. 10/26/55, granted.

Nov. 18—Brief filed by respondent. Served 11/21/55.

Dec. 23—Motion for extension to Jan. 30, 1956 to file reply brief filed by petitioner. 12/28/55, granted.

1956

Jan. 30—Reply brief filed by taxpayer.(1)—2 copies rec'd. 1/31/56. 1/31/56, served.

Nov. 16—Memorandum findings of fact and opinion filed. Van Fossan J. Decision will be entered under Rule 50. Served 11/16/56.

1957

Mar. 27—Agreed computation filed.

Apr. 2—Decision entered, Judge Van Fossan. Served 4/3/57.

May 10—Motion for permission to withdraw exhibits filed by petitioner. Served 5/17/57. Granted 5/14/57.

Jul. 1—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Jul. 1—Proof of service filed.

Jul. 1—Petition for review by U. S. Court of Appeals, Fifth Circuit, with assignments of error filed by petitioner.

Jul. 1—Proof of service filed.

1957

- Jul. 8—Entry of appearance of Louis Eisenstein, as counsel, filed.
- Aug. 7—Designation of record on review filed by petitioner (9th Circuit) with acknowledgment of service thereon.
- Aug. 7—Order extending time for filing record on review and docketing petition for review to Sept. 29, 1957, entered (9th Circuit). Served 8/8/57.
-

The Tax Court of the United States

Docket No. 51526

E. ROYCE AND DORA F. ROYCE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1953

- Dec. 21—Petition received and filed. Taxpayer notified. Fee paid.
- Dec. 22—Copy of petition served on General Counsel.
- Dec. 21—Request for Circuit hearing in Portland, Oregon filed by taxpayer. 1/5/54, granted.

1954

- Feb. 23—Answer filed by General Counsel.
- Feb. 24—Copy of answer served on taxpayer, Portland, Oregon.

1954

Apr. 5—Motion for better statement filed by taxpayer. 4/16/54, copy served.

Apr. 6—Hearing set May 5, 1954, Washington, D. C. on petitioner's motion. 4/6/54, copy served.

Apr. 26—Motion to withdraw motion for a better statement of Pleadings filed Apr. 6, 1954, filed by taxpayer. 4/26/54, granted.

1955

Feb. 15—Hearing set May 9, 1955, Portland, Oregon.

May 12, Hearing had before Judge Van Fossan on 14, the merits. Petitioner's oral motion to 16—consolidate dockets 51491, 51526 to 51529 incl., 51531, 51533 — no objection by respondent — granted; petitioner's oral motion to file stipulation of facts later with respect to specific issues — granted, and stipulation of the parties to take deposition — granted — to be taken within ten days. Entry of appearance of Randall S. Jones, Esq. and Stipulation of facts with Exhibits 1 through 13, B through T, attached, Exhibit A later attached to stipulation, filed at hearing. Petitioner's brief, 7/15/55; respondent's brief, 8/29/55; petitioner's reply, 9/28/55.

May 23—Motion for leave to withdraw the original of each subpoena of Mrs. Fannie Orsen et al. filed by General Counsel. 6/1/55, granted.

1955

- May 25—Joint motion for leave to file supplemental stipulation of facts in lieu of deposition, supplemental stipulation of facts lodged, filed.
- Jun. 1—Joint motion for leave to file supplemental stipulation of facts in lieu of deposition granted. Supplemental stipulation of facts filed.
- Jun. 2—Motion to withdraw exhibits 12, 13, 16, 19, 22, 23, 24, 27 and 32 to 44, incl., filed by taxpayer. 6/3/55, granted.
- Jun. 9—Transcript of Hearing 5/12/55 filed.
- Jun. 9—Transcript of Hearing 5/14/55 filed.
- Jun. 9—Transcript of Hearing 5/16/55 filed.
- Jul. 5—Motion for extension to 8/15/55 to file brief filed by taxpayer. 7/5/55, granted.
- Aug. 15—Brief filed by taxpayer. Copy served.
- Sep. 6—Motion for leave to file settlement stipulations in respect of certain issues, stipulation relative to disposition of certain issues lodged, filed. 9/7/55, granted.
- Sep. 26—Motion for extension to Oct. 31, 1955 to file brief and November 30, 1955 to file petitioner's reply brief filed by General Counsel. 9/27/55, granted.
- Oct. 25—Joint motion for extension to Nov. 18, 1955 to file respondent's brief and to Dec. 30, 1955 to file petitioner's reply brief filed. 10/26/55, granted.
- Nov. 18—Brief filed by respondent. Served 11/21/55.

1955

Dec. 23—Motion for extension to Jan. 30, 1956 to file reply brief filed by petitioner. 12/28/55, granted.

1956

Jan. 30—Reply brief filed by taxpayer. (Copies served 1/31/56.)

Nov. 16—Memorandum findings of fact and opinion filed. Van Fossan J. Decision will be entered under Rule 50. Served 11/16/56.

1957

Mar. 27—Agreed Computation filed.

Apr. 2—Decision entered, Judge Van Fossan. Served 4/3/57.

May 10—Motion to withdraw exhibits filed by petitioner. Granted 5/14/57. Served 5/17/57.

Jul. 1—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Jul. 1—Proof of service filed.

Jul. 1—Petition for review by U. S. Court of Appeals, Fifth Circuit, with assignments of error filed by petitioner.

Jul. 1—Proof of service filed.

Jul. 8—Entry of appearance of Louis Eisenstein, as counsel filed.

Aug. 7—Designation of Record on review filed by petitioners. (9th Circuit.)

Aug. 7—Order extending time for filing record on review and docketing petition for review to September 29, 1957, entered. (9th Circuit.) Served 8/8/57.

The Tax Court of the United States

Docket No. 51527

EZRA ROYCE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

[Note: Docket Entries in Docket No. 51527
are the same as Docket Entries in No. 51526
set out at pages 6-9 except the following]:

1953

May 21—Granted leave to file; Reply to Answer
filed by taxpayer.

The Tax Court of the United States

Docket No. 51528

B. ROYCE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1953

Dec. 21—Petition received and filed. Taxpayer no-
tified. Fee paid.

Dec. 22—Copy of petition served on General Coun-
sel.

1953

Dec. 21—Request for Circuit hearing in Portland, Oregon filed by taxpayer. 1/5/54, granted.

1954

Feb. 23—Answer filed by General Counsel.

Feb. 24—Copy of answer served on taxpayer, Portland, Oregon.

Apr. 5—Motion for a better statement filed by taxpayer. 4/6/54, copy served.

Apr. 6—Hearing set May 5, 1954, Washington, D. C. on petitioner's motion. Copy served 4/6/54.

Apr. 26—Motion to withdraw motion for a better statement of Pleadings filed April 6, 1954 filed by taxpayer. 4/26/54, granted.

1955

Feb. 15—Hearing set May 9, 1955, Portland, Oregon.

May 12, Hearing had before Judge Van Fossan on 14, the merits. Petitioner's oral motion to 16—consolidate dockets 51491, 51526 to 51529, incl., 51531, 51533 — no objection by respondent — granted; petitioner's oral motion to file stipulation of facts later with respect to specific issues — granted, and stipulation of the parties to take deposition — granted — to be taken within ten days. Entry of appearance of Randall S. Jones, Esq. and Stipulation of Facts with Exhibits 1 through 13, B through T, attached, Exhibit A later attached to stipulation, filed at hearing. Petitioner's Brief,

1955

(Cont.) 7/15/55; respondent's brief, 8/29/55; petitioner's reply, 9/28/55.

May 23—Motion for leave to withdraw the original of each subpoena of Mrs. Fannie Orsen et al. filed by General Counsel. 6/1/55, granted.

Jun. 2—Motion to withdraw exhibits 12, 13, 16, 19, 22, 23, 24, 27, and 32 to 44, incl. filed by taxpayer. 6/3/55, granted.

Jun. 9—Transcript of Hearing 5/12/55 filed.

Jun. 9—Transcript of Hearing 5/14/55 filed.

Jun. 9—Transcript of Hearing 5/16/55 filed.

Jul. 5—Motion for extension to 8/15/55 to file brief filed by taxpayer. 7/5/55, granted.

Aug. 15—Brief filed by taxpayer. Copy served.

Sep. 6—Motion for leave to file settlement stipulation in respect of certain issues, stipulation relative to disposition of certain issues lodged, filed. 9/7/55, granted.

Sep. 26—Motion for extension to Oct. 31, 1955 to file brief and Nov. 30, 1955 to file petitioner's reply brief filed by General Counsel. 9/27/55, granted.

Oct. 25—Joint motion for extension to Nov. 18, 1955 to file respondent's brief and December 30, 1955 to file petitioner's reply brief filed. 10/26/55, granted.

Nov. 18—Brief filed by respondent. Served 11/21/55.

Dec. 23—Motion for extension to Jan. 30, 1956 to file reply brief filed by petitioner. 12/28/55, granted.

1956

Jan. 30—Reply brief filed by taxpayer. 1/31/56, served.

Nov. 16—Memorandum findings of fact and opinion filed. Van Fossan J. Decision will be entered under Rule 50. Served 11/16/56.

1957

Mar. 27—Agreed Computation filed.

Apr. 2—Decision entered, Judge Van Fossan. Served 4/3/57.

May 10—Motion to withdraw exhibits filed by petitioner. Granted 5/14/57. Served 5/17/57.

Jul. 1—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Jul. 1—Proof of service filed.

Jul. 1—Petition for review by U. S. Court of Appeals, Fifth Circuit, with assignments of error filed by petitioner.

Jul. 1—Proof of service filed.

Jul. 8—Entry of appearance of Louis Eisenstein, as counsel filed.

Aug. 7—Designation of record on review filed by petitioner. (9th Circuit.)

Aug. 7—Order extending time for filing record on review and docketing petition for review to September 29, 1957, entered. (9th Circuit.) Served 8/8/57.

The Tax Court of the United States

Docket No. 51529

ESTATE OF ISABELLE H. ROYCE, DE-
CEASED, B. ROYCE, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

[Note: Docket Entries in Docket No. 51529
are the same as Docket No. 51528 set out at
pages 10-13 except the following]:

1953

Dec. 21—Request for Circuit Hearing in Portland,
Oregon filed by taxpayer.

1954

Feb. 23—Request for hearing in Portland filed by
General Counsel.

The Tax Court of the United States

Docket No. 51531

ROBERT T. JACOB AND AGNES C. JACOB,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1953

Dec. 21—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 22—Copy of petition served on General Counsel.

Dec. 21—Request for Circuit hearing in Portland, Oregon filed by taxpayer. 1/6/54, granted.

1954

Feb. 23—Answer filed by General Counsel.

Feb. 24—Copy of answer served on taxpayer, Portland, Oregon.

1955

Feb. 15—Hearing set May 9, 1955, Portland, Oregon.

May 12 Hearing had before Judge Van Fossan on
14 the merits. Petitioner's oral motion to con-
16—solidate dockets 51491, 51526 to 51529, incl.,
51531, 51533—no objection by respondent—
granted; petitioner's oral motion to file
stipulation of facts later with respect to
specific issues—granted—and stipulation

1955

- (Con't). of the parties to take deposition—granted
—to be taken within ten days. Entry of
appearance of Randall S. Jones, Esq. and
stipulation of facts with exhibits 1 thru 13,
B thru T, attached, Exhibit A later at-
tached to stipulation, filed at hearing. Peti-
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8/29/55; petitioner's reply brief, 9/28/55.
- May 23—Motion for leave to withdraw the original
of each subpoena of Mrs. Fannie Orsen et
al filed by General Counsel. Granted 6/1/55.
- Jun. 2—Motion to withdraw exhibits 12, 13, 16, 19,
22, 23, 24, 27 and 32 to 44 incl., filed by
taxpayer. 6/3/55, granted.
- Jun. 9—Transcript of Hearing 5/12/55 filed.
- Jun. 9—Transcript of Hearing 5/14/55 filed.
- Jun. 9—Transcript of Hearing 5/16/55 filed.
- July 5—Motion for extension to Aug. 15, 1955 to
file brief filed by taxpayer. 7/5/55, granted.
- Aug. 15—Brief filed by taxpayer. Copy served.
- Sep. 6—Motion for leave to file settlement stipula-
tion in respect of certain issues, stipulation
relative to disposition of certain issues
lodged, filed. 9/7/55, granted.
- Sep. 26—Motion for extension to Oct. 31, 1955 to
file brief and to Nov. 30, 1955 to file peti-
tioner's reply brief filed by General Coun-
sel. 9/27/55, granted.
- Oct. 25—Joint motion for extension to Nov. 18, 1955
to file respondent's brief and December 30,

1955

Oct. 25—1955 to file petitioner's reply brief filed. (Con't). 10/26/55, granted.

Nov. 18—Brief filed by respondent. Served 11/21/55.

Dec. 23—Motion for extension to Jan. 30, 1956 to file reply brief filed by petitioner. 12/28/55, granted.

1956

Jan. 30—Reply brief filed by taxpayer. 1/31/56, served.

Nov. 16—Memorandum findings of fact and opinion filed. Van Fossan J. Decision will be entered under Rule 50. Served 11/16/56.

1957

Mar. 27—Agreed Computation filed.

Apr. 2—Decision entered. Judge Van Fossan. Served 4/3/57.

May 10—Motion for permission to withdraw exhibits filed by petitioner. Granted 5/14/57. Served 5/17/57.

July 1—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioners.

July 1—Proof of service of petition for review filed.

July 1—Petition for review by U. S. Court of Appeals, Fifth Circuit, with assignments of error filed by petitioners.

July 1—Proof of service filed.

July 8—Entry of appearance of Louis Eisenstein as counsel filed.

Aug. 7—Designation of record on review filed by petitioners. (9th Circuit)

1957

Aug. 7—Order extending time for filing record on review and docketing petition for review to September 29, 1957, entered. (9th Circuit)
Served 8/8/57.

The Tax Court of the United States

DOCKET ENTRIES

Docket No. 51533

[Note: Docket Entries in No. 51533 are the same as No. 51531 set out at pages 15-18].

[Title of Tax Court and Docket No. 51491.]

PETITION

The above named petitioner hereby petitions the above entitled Court for a redetermination of the deficiency set forth by the respondent in his Notice of Deficiency bearing symbols ARC-Ap:SF Port:-VEV:90D dated the 28th day of September, 1953, and as a basis of his proceeding alleges as follows:

I.

The petitioner is an individual residing in Portland, Oregon, and the return for the period here involved was filed with the Collector of Internal Revenue at Portland, Oregon.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on September 28, 1953.

III.

The within controversy involves a deficiency in Federal income taxes and penalty determined by the Commissioner for the year and in the amounts as follows:

Year	Deficiency	Penalty Under Section 294(d)(2)
1945	\$32,348.48	\$1,940.07

The entire amounts of tax and penalty are in controversy.

IV.

In arriving at his conclusion set forth in his Notice of Deficiency, the respondent committed the following errors:

(1) Respondent erred in including in petitioner's income the sum of \$48,125.00, or any sum whatsoever, as dividends from Oregon Motor Stages.

(2) The respondent further erred in including in petitioner's income the sum of \$1,141.91, or any sum whatsoever, as an additional distribution (Oregon Motor Stages) or on any account whatsoever.

(3) The respondent further erred in asserting a penalty of \$1,940.07, or any sum whatsoever, under the provisions of Section 294(d)(2), or any other section of Internal Revenue Code.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(a) During the taxable year 1945, petitioner was married and living with his wife at Portland, Oregon.

(b) During the year 1945, E. Royce, B. Royce and

others, entered into negotiations with the then stockholders of Oregon Motor Stages for the acquisition of the capital stock of said corporation. There were outstanding at that time 750 shares of common stock of said corporation and the price upon which negotiations were based was \$1,000.00 per share. E. Royce, B. Royce, Albert L. Schneider, R. T. Jacob and petitioner began preparations for the acquisition of said stock, whereupon one L. R. Bentson of Vancouver, B. C., who was a relative of E. and B. Royce, informed the said group that he desired to acquire a portion of the stock of said company and he agreed to and did purchase 350 shares of its stock.

(c) Mr. Bentson advised said group that his funds were in Canada and were blocked and that it would be necessary for him to make arrangements in the United States to finance his purchase. Thereupon a loan was negotiated on his behalf with the Portland Branch of the American Business Credit Corporation. The stock of petitioner was, as an accommodation, pledged with Mr. Bentson's stock as security for said loan, but petitioner did not participate in the negotiation of said loan and assumed no obligation whatsoever for its payment.

(d) After the conclusion of World War II in August, 1945, Mr. Bentson voiced his apprehension that the earnings of Oregon Motor Stages would be drastically curtailed and that the investment would not prove as profitable as he had anticipated at the time of his purchase. Mr. Bentson then made an offer to the corporation, which the corporation ac-

cepted, to surrender his 350 shares of stock upon the corporation paying the interest on his obligation and liquidating the loan obtained by him from the said Branch of the American Business Credit Corporation. Upon the surrender of his shares of stock, Oregon Motor Stages issued to him a check for the sum of \$350,000.00 which said check Mr. Bentson delivered to American Business Credit Corporation in payment of his said loan.

(e) Petitioner received no part of said payment of said loan either directly, indirectly or constructively, nor did petitioner receive any benefit directly, indirectly or constructively from the payment of said sum to the said Mr. Bentson.

(f) Subsequent to petitioner's purchase of said stock in Oregon Motor Stages, petitioner was required by direction of the Interstate Commerce Commission, because of his connections with other carriers engaged in interstate commerce, to dispose of his stock in said Oregon Motor Stages, and petitioner sold his said stock on June 20, 1946, to A. L. Schneider for the sum of \$55,000.00, the exact amount paid by him for said shares of stock in 1945.

(g) The facts as set forth in paragraph (b) through paragraph (f) above apply with equal force and effect to the item of \$1,141.91 included by respondent in petitioner's income as an "additional distribution (Oregon Motor Stages)".

(h) On petitioner's estimated tax, 1040 ES, for the year 1945, the full amount of tax estimated to be due and owing was reported and accordingly the penalty proposed is without foundation.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income taxes for the year 1945, and that petitioner is not subject to any penalty determined by the Commissioner, or any part thereof.

/s/ R. T. JACOB,
Attorney for Petitioner.

Of Counsel:

Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department
Office of the Regional Commissioner
Internal Revenue Service
1112 Cascade Building
Portland 4, Oregon
September 28, 1953

In Replying Refer To: ARC-Ap:SF Port:VEV:-
90D

Mr. Fred C. Niederkrome,
4810 S. W. 60th Place,
Portland, Oregon.

Dear Mr. Niederkrome:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1945, discloses a deficiency in the amount of \$32,348.48, and \$1,940.07 in penalty, as shown in the statement attached.

In accordance with the provisions of existing in-

ternal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner.

By /s/ A. N. Williams,
Associate Chief, Appellate Division.

Enclosures: Statement Form 1276 Agreement Form
870.

ARC-Ap:SF

Port:VEV:90D STATEMENT

Mr. Fred C. Niederkrome

4810 S. W. 60th Place, Portland, Oregon

Income tax liability for the taxable year ended
December 31, 1945.

Year	Deficiency	Penalty Section 294(d) (2)
1945	\$32,348.48	\$1,940.07

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 6, 1951, and to your protest dated August 16, 1951.

The 6% penalty for substantial underestimate of estimated tax has been asserted in accordance with the provisions of Section 294(d)(2) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Robert T. Jacob, 917 Public Service Building, Portland, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1945

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$12,466.09
Unallowable deductions and additional income:	
(a) Dividends (Oregon Motor Stages)....	\$48,125.00
(b) Additional distribution (Oregon Motor Stages)	1,141.91 49,266.91
Total	\$61,733.00
Non-taxable income and additional deductions:	
(c) Interest expense	1,028.43
Net income adjusted	\$60,704.57

Explanation of Adjustments

(a) The records of this office show that prior to July 2, 1945, you, E. Royce, B. Royce, Robert T. Jacob and A. L. Schneider negotiated for the purchase of the capital stock of Oregon Motor Stages, Portland, Oregon, an Oregon corporation engaged in the business of bus transportation. The outstanding stock of that corporation then consisted of 750 common shares, with a par value of \$100.00 per share.

As a result of the negotiations referred to above, on or about July 2, 1945, you and your associates purchased shares of Oregon Motor Stages in the number and at the cost shown below:

	Shares	Cost
E. Royce	145	\$145,000.00
B. Royce	50	50,000.00
Robert T. Jacob.....	100	100,000.00
Fred C. Niederkrome	55	55,000.00
A. L. Schneider.....	50	50,000.00
	<hr/>	<hr/>
Total	400	\$400,000.00
		<hr/> <hr/>

In accordance with the plan adopted, the remaining 350 shares of Oregon Motor Stages stock were acquired in the name of L. R. Bentson, 411 E. 15th Street, North Vancouver, B.C., an uncle of E. Royce and B. Royce, in consideration of payment of \$350,000.00 cash. Such payment was made from the proceeds of a loan obtained by E. Royce acting for you, himself and your above-named associates, through the Portland Branch of the American Business Credit Corporation, New York City, on a 90-day note which was signed by E. Royce and

L. R. Bentson, and which was collateralized by deposit of the entire 750 shares of stock of Oregon Motor Stages.

On or about September 6, 1945, pursuant to the plan adopted by you and your associates, as aforesaid, Oregon Motor Stages acquired the 350 shares of its own stock then standing in the name of L. R. Bentson and issued its check to him in the sum of \$350,000.00. This check was immediately endorsed and delivered to the American Business Credit Corporation in satisfaction of the 90-day note signed by E. Royce and L. R. Bentson.

It has been determined that it was not intended that L. R. Bentson should acquire, nor did he at any time acquire, any bona fide or actual beneficial interest in the stock of Oregon Motor Stages.

It has been further determined that the accumulated earnings and profits of Oregon Motor Stages available for distribution as dividends during the year 1945 were in excess of \$350,000.00.

This office holds that the transaction whereby Oregon Motor Stages acquired 350 shares of its capital stock, which were issued in the name of L. R. Bentson, for the sum of \$350,000.00, was consummated at such a time and in such a manner as to result in the realization of taxable income to you in the amount of \$48,125.00, such sum being that portion of the total sum of \$350,000.00 which 55 shares of stock of Oregon Motor Stages owned by you bears to the total of 400 shares of such stock owned by you, E. Royce, B. Royce, Robert T. Jacob and A. L. Schneider.

(b) It has been further determined that in connection with the transaction whereby Oregon Motor Stages acquired 350 shares of its stock in the manner stated above, that corporation paid interest to the American Business Credit Corporation and attorney fees in the respective total amounts of \$8,054.80 and \$2,135.41. With respect to these sums, this office holds that to the extent of \$1,107.54 and \$34.37, respectively, payment of interest and attorney fees was in satisfaction of your personal liability incurred in connection with the transactions whereby you acquired the stock of Oregon Motor Stages. Your reported income has, therefore, been increased by \$1,141.91.

(c) It has been determined that of the amount of \$1,107.54 heretofore held under item (b) above to be taxable to you, the sum of \$1,028.43 is allowable as a deduction for interest paid in 1945.

Computation of Income Tax—1945

Net income adjusted.....	\$60,704.57
Less: Normal tax exemption.....	500.00
<hr/>	
Balance subject to normal tax.....	\$60,204.57
Normal tax—3% of \$60,204.57.....	1,806.14
Net income adjusted.....	\$60,704.57
Less: Surtax exemption.....	1,000.00
<hr/>	
Balance subject to surtax.....	\$59,704.57
Surtax	\$34,098.43
<hr/>	
Income tax liability.....	\$35,904.57
Income tax liability disclosed by return, Account No. 9080946.....	3,556.09
<hr/>	
Deficiency in income tax.....	\$32,348.48
<hr/>	

Penalty, Section 294(d)(2), Internal Revenue Code			
Income tax liability as adjusted.....			\$35,904.57
Less: withholding tax	\$	389.90	
paid on estimated declaration.....		3,180.10	3,570.00
			<hr/>
Difference			\$32,334.57
Penalty (6% of \$32,334.57).....			1,940.07
			<hr/> <hr/>

[Endorsed]: T.C.U.S. Dec. 15, 1953.

[Title of Tax Court and Docket No. 51491.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, 'Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.

2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegations contained in paragraph III of the petition.

4. Denies that he erred in his determination of the deficiency in income tax and penalty as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5. (a) Admits the allegations contained in paragraph V(a) of the petition.

(b) Admits the allegations contained in the first two sentences of paragraph V(b) of the petition.

Denies the remaining allegations contained in paragraph V(b) of the petition.

(c) Denies the allegations contained in paragraph V(c) of the petition. Alleges that the nature of the stock transaction including the acquisition, payment and disposition of the remaining 350 shares of Oregon Motor Stages stock was as explained on pages 1 to 3, inclusive, of Exhibit A attached to the petition on file in this proceeding.

(d) and (e). Denies the allegations contained in paragraph V(d) and (e) of the petition.

(f) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(f) of the petition.

(g) and (h). Denies the allegations contained in paragraph V (g) and (h) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commission's determination of deficiency and penalty be approved.

/s/ DANIEL A. TAYLOR,

Chief Counsel,

Internal Revenue Service.

Of Counsel: Wilford H. Payne, Associate Appellate Counsel, John D. Picco, Special Attorney,
Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 15, 1954.

[Title of Tax Court and Docket No. 51526.]

PETITION

The above named petitioners hereby petition the above entitled Court for a redetermination of the deficiency set forth by the respondent in his Notice of Deficiency (Symbols ARC-Ap: SF Port VEV: 90D) dated the 28th day of September, 1953, and as a basis for their proceeding allege as follows:

I.

The petitioner are husband and wife and reside in Portland, Multnomah County, Oregon, and they filed their Federal Income Tax Returns for the years involved herein with the Collector of Internal Revenue for the District of Oregon, at Portland, Oregon.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioners on September 28, 1953.

III.

The within controversy involves an asserted deficiency in Federal Income Taxes for the years and in the amounts as follows:

Year	Deficiency
1948	\$73,966.90
1949	35,145.26

Total

\$109,112.16

of which the entire amounts are in controversy.

IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

1. The respondent erred in including in petitioners' income the sum of \$15,440.00, or any sum whatsoever for the year 1948, and the sum of \$5,640.00, or any sum whatsoever, for the year 1949, as rental payments made during said years by Burnside Realty, Inc., and in holding that the petitioners derived any income whatsoever therefrom.

2. The respondent erred in determining that Eunice M. Royce was not a partner of Yellow Cab Company of Seattle for the year 1948 and 1949 and that the distributive share of said partnership income reported by Eunice M. Royce was the income of petitioners.

3. The respondent erred in increasing the petitioners' distributive partnership income in the amount of \$41,668.22 for the year 1948 and in the amount of \$29,729.80 for the year 1949, or any other amounts.

(a) The respondent erred in determining that the petitioners' distributive share of partnership income from the Yellow Cab Company of Portland for the year 1948 was \$15,470.67, and for the year 1949 was \$11,493.24, or any other amounts, greater than that reported by the petitioners for said years and, more specifically, the respondent erred in determining that the said partnership had claimed excessive depreciation in the amounts of \$10,806.28 for the year 1948 and \$3,400.42 for the year 1949, or any other amounts, that payments to Charles

W. Keffer and C. H. Luton in the amount of \$707.32 for the year 1948, or any other amount, are not deductible in computing said partnership income, that the sums of \$17,927.76 for the year 1948 and \$16,986.07 for the year 1949, or any other amounts, accrued as a city revenue tax on said partnership's books for said years were unallowable as deductions for said years and in determining that the sum of \$1,500.00 for the year 1948 and \$2,600.00 for the year 1949 were expended in said year in preparing used cabs for sale and that said sums were not deductible as an ordinary and necessary business expense of the said partnership.

4. The respondent erred in increasing the petitioners' net capital gains for the calendar year 1948 in the amount of \$899.01, and for the calendar year 1949 in the amount of \$1,194.84, or any other amounts.

(a) The respondent erred in determining that the petitioners' distributive share of long-term capital gains from the partnership of Yellow Cab Company of Seattle was in the amount of \$3,866.50, or any other amount in excess of \$1,468.37 for the calendar year 1948.

(b) The respondent erred in determining that the stock and note of Portland Meadows held by petitioner became worthless in the year 1948 rather than in the year 1949, and that the loss on the said note was allowable only as a long-term capital loss.

5. The respondent erred in determining that the petitioners received 560,000 shares of the common stock of Alder Gold-Copper Company in the year

1948 and 100,000 shares of said stock in the year 1949, and that the receipt of said stock in said years constituted additional taxable income in the amount of \$56,000.00, for the year 1948 and \$9,761.40, for the year 1949, or any other amounts.

6. The respondent erred in determining a disallowance of a bad debt loss in the amount of \$11,-632.86 or any other amount claimed by petitioners for the calendar year 1949.

7. The respondent erred in determining additional income to petitioners in the amount of \$6,-531.15, or any other amount, for the calendar year 1949, from the purchase by petitioners of the property located on West Burnside Street in Portland, Oregon.

V.

The facts upon which petitioners rely as a basis for their appeal are as follows:

(a) Petitioners are husband and wife, residing in Portland, Oregon, and they reported their income for Federal Income Tax purposes on the basis of cash receipts and disbursements and calendar year.

(b) The respondent has determined for each of the years herein involved that rental payments made by Burnside Realty, Inc., pursuant to a lease agreement dated April 29, 1944, constituted taxable income to petitioner.

(c) On the 13th day of April, 1944, petitioner obtained an option to acquire a parcel of real estate on N.W. 21st and Burnside Streets in Portland, Oregon, from L. W. Hendrickson and Sue Hend-

rickson, husband and wife. The option price was a favorable one and in order for petitioner to be entitled to exercise the option at the end of a 5 year period, it was provided in effect that petitioner acquire a tenant for a five year term for the building which would be willing to pay and agree to pay for a five year period the sum of \$1,500.00 per month.

(d) Burnside Realty, Inc., was incorporated on the 18th day of April, 1944, with an authorized capital stock of 30 shares and a par value of \$50.00 per share, or a total capitalization of \$1,500.00. Petitioner subscribed to 10 shares thereof, Harold Murphy subscribed to 10 shares thereof and A. L. Schneider subscribed to 10 shares thereof and each agreed to pay for their stock the par value thereof.

(e) By a lease agreement dated the 29th day of April, 1944, Burnside Realty, Inc., agreed to lease from the said L. W. and Sue Hendrickson the building and equipment therein located at N.W. 21st and Burnside Streets for an agreed rental of \$1,500.00 per month and for a five year term.

(f) The said building leased by Burnside Realty, Inc., was a two story structure with the lower story occupied by commercial rental units and the upper floor was one large ballroom. Burnside Realty, Inc., was organized to engage in the business of operating the rental properties and of operating a ballroom. There was restaurant and ballroom equipment included in the building and included in the lease of a total reasonable value of approximately \$15,000.00. The reasonable rental value of the

building for any one or any entity who or which wished to operate a rental property and a ballroom of this character was in excess of \$1,500.00 per month.

(g) On or about January 14, 1946, the said three stockholders of Burnside Realty, Inc., each surrendered $2\frac{1}{2}$ shares of his stock and the surrendered stock was then issued to Mr. Edward J. Cheney, an experienced ballroom operator.

(h) During all of the years herein involved, Burnside Realty, Inc., operated the rental properties and operated the ballroom therein and made the rental payments called for under the lease agreement with the said Hendricksons.

(i) At or about the time petitioner obtained the option to purchase the said real property from the Hendricksons, the Hendricksons executed a Deed and Bill of Sale to said property and the personal property located therein, to the petitioner and said documents were placed in escrow with the Bank of California. Petitioner exercised his option in 1949 to purchase the property in accordance with the terms thereof.

(j) The respondent has determined that the petitioners' daughter, Eunice M. Royce, was not, for the years 1945 to 1949, inclusive, a bona fide partner in the partnership known as the Yellow Cab Company of Seattle and that the income reported by the said Eunice M. Royce for the said years was includible in the income of petitioners.

(k) In April, 1944, petitioner was a stockholder in the Yellow Cab Company of Seattle (Washing-

ton), a Washington corporation. Prior to April 30, 1944, petitioner made a gift of 402½ shares of his said stock to Dora F. Royce and of 700 shares of his said stock to himself as trustee under a formal declaration of trust for Eunice Mae Royce, his minor daughter.

(l) Said Yellow Cab Company was liquidated on the 30th day of April, 1944, and all of its assets of every kind and character were conveyed to the then stockholders of record including the said Dora F. Royce and Eunice Mae Royce. On the 1st day of May, 1944, all of the persons who had been stockholders of said Yellow Cab Company, including the said Dora F. Royce and Eunice Mae Royce, conveyed the said property to the Yellow Cab Company of Seattle, a partnership. The said Dora F. Royce and Eunice Mae Royce really intended to be, and all members of the partnership intended them to be partners in said partnership and all the members thereof entered into a formal partnership agreement and publicly proclaimed themselves to be partners. They were and are partners for Federal Tax as well as other purposes.

(m) On or about the 28th day of November, 1942, petitioner and B. Royce purchased the partnership interests of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland for a cash consideration. At the same time, the partnership entered into a profit sharing agreement with the said Charles Keffer and C. H. Luton whereby each would be entitled to a certain percentage of the partnership profits thereafter as long as it was mu-

tually agreeable that the said individuals continued in the employment of the partnership. Percentage of profit payments made under these agreements were properly deducted by the partnership in computing its net income for the year 1948 herein involved.

(n) For the year 1948 the Commissioner determined that the Yellow Cab Company of Portland had claimed excessive depreciation in the amount of \$10,806.28 and in the amount of \$3,400.42 for the year 1949.

(o) The Yellow Cab Company of Portland has, for a number of years, followed the consistent practice of using a straight line method of depreciation and completely writing off all of its taxi-cabs over a four year period. The depreciation claimed by the Yellow Cab Company of Portland constituted a reasonable allowance for exhaustion, wear and tear (including a reasonable allowance for obsolescence), under normal circumstances.

(p) During the calendar years 1948 and 1949, the City of Portland assessed a city 2% gross revenue tax on the partnership known as the Yellow Cab Company of Portland in the amounts of \$17,927.67 and \$16,986.07 respectively. These said sums were accrued on the books of the Yellow Cab Company of Portland in the years indicated and were claimed by said partnership as deductions on its returns for the said years, in accordance with the method of accounting regularly employed in keeping its books of account.

(q) The respondent has disallowed \$1,500.00 for

the year 1948 and \$2,600.00 for the year 1949 of the repair expenses claimed by the Yellow Cab Company of Portland, a partnership, as deductions for said years, respectively, said disallowance being based upon the theory that the said company made capital expenditures of \$100.00 per cab sold in those years in preparing and painting each cab for sale.

(r) The Yellow Cab Company of Portland, a partnership, maintains its own garage and staff of mechanics and makes any and all repairs necessary to its cabs therein. The repair and painting expenses incurred by the said company for the years 1948 and 1949 represent repairs required in the ordinary course of business, and were charged to the account of repairs and maintenance in accordance with the method of accounting regularly employed and established many years before.

(s) Any common stock of Alder Gold-Copper Company received by petitioner in the calendar years 1948 and 1949 represented stock issued to him for monies paid in or advanced by him on behalf or in connection with the said corporation. Also, the said common stock of the said corporation did not have any fair or market value during said years 1948 and 1949. Petitioner did not receive any said stock as compensation for services.

(t) During the calendar year 1949, petitioner, E. Royce, exercised his option to purchase certain property located on West Burnside in Portland, Oregon. There was due to B. Royce, petitioner's brother, the sum of \$6,531.15 in connection with the purchase of said property. Petitioner, E. Royce,

was not relieved of his obligation to B. Royce for said amount and in fact, E. Royce paid off this obligation in full in 1951, plus interest, to his said brother. There was no cancellation of the obligation at any time prior to its payment in full.

(u) In 1946, petitioner, E. Royce, had purchased \$100.00 worth of stock in Portland Meadows, Inc., and advanced \$900.00 to said company on a note. Said note was not in registered form and was not a security as that term is defined in the Internal Revenue Code. The stock and note became worthless in 1949, and petitioners properly claimed a long-term loss on the said stock and were entitled to deduct the full amount of loss on the note as a non-business bad debt.

(v) The basis for the respondent's determination that petitioners had additional capital gain from the partnership Yellow Cab Company of Seattle is not set forth and petitioners are, therefore, at a loss with regard to determining what facts need to be set forth. Petitioners allege that the net short-term gain and long-term capital gain reported by them as their distributive share of said gains from said partnership for the years 1948 and 1949 were properly and accurately reported.

(w) On or about November 19, 1946, petitioner, E. Royce, in the regular course of his business, loaned the sum of \$20,000.00 to East Side Buses, a partnership.

(x) In 1949, petitioner, E. Royce, received property of the value of \$8,367.14 in full settlement of the note and the balance due on the note was deter-

mined to be uncollectible and said part of said debt worthless in said year and was properly claimed by petitioners as a loss in the amount of \$11,632.86 in said year.

Wherefore, petitioners pray that the Court hear this proceeding and determine that there is no deficiency in income taxes for the years 1948 and 1949, or either of them, and give such other or further relief as in the premises the Court may deem fit and proper.

/s/ R. T. JACOB.

Of Counsel:

Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

Regional

1112 Cascade Building

Portland 4, Oregon

ARC-Ap:SF

Port:VEV:90D

Mr. E. Royce

Mrs. Dora F. Royce

628 N. W. Sixth Avenue

Portland, Oregon

Dear Mr. and Mrs. Royce:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948 and 1949, discloses deficiencies in the total amount of \$109,112.16, as shown in the statement attached.

In accordance with the provisions of existing in-

ternal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days, you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,

Commissioner,

/s/ By A. N. Williams,

Associate Chief, Appellate Division.

Enclosures:

Statement

Form 870

Form 1276

VEVlene la

STATEMENT

E. Royce and Dora F. Royce

Husband and Wife

628 N.W. Sixth Avenue

Portland, Oregon

Income tax liability for the taxable years ended
December 31, 1948, and 1949.

Year	Deficiency
1948	\$ 73,966.90
1949	35,145.26
Total	<u><u>\$109,112.16</u></u>

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 9, 1951, and to your protest dated September 5, 1951.

A copy of this letter and statement has been mailed to your representative, Mr. Robert T. Jacob, 917 Public Service Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

The records of this office show that on or prior to April 13, 1944, Lloyd W. Hendrickson and Sue Hendrickson, husband and wife, were the owners of certain real and personal properties located at Northwest 21st and Burnside Streets, Portland, Oregon, the real property being otherwise described as a portion of Block 31, Kings Second Addition to the City of Portland. On that date, April 13, 1944, Mr. and Mrs. Hendrickson executed a document

designated as an "Option to Buy" whereby they gave you an option to purchase said real and personal properties on or prior to April 19, 1949, in accordance with the terms and conditions therein stated. The option agreement recited that it was "understood that said property" was then "under lease for a term" which would expire on April 19, 1949, and that the option therein provided for could be exercised only "after all rentals reserved in said lease" were fully paid at the time provided in the lease or in advance thereof. The option agreement further stated that it was expected that part of the obligations then outstanding against the property would remain unpaid at the expiration of the term of the lease. By the terms of the agreement, if you exercised your election to purchase, you would be required to pay the sum of \$35,000.00 less any outstanding indebtedness assumed by you, plus interest thereon.

On or about April 18, 1944, you, A. L. Schneider and Harold Murphy organized Burnside Realty, Inc., under the laws of Oregon with an authorized capital stock of 30 common shares, par value \$50.00 per share, which was issued to you, Mr. Schneider and Mr. Murphy in equal one-third proportions. This corporation was purportedly organized for the purpose of continuing the operation of rental and amusement businesses theretofore conducted in and on the premises owned by Lloyd W. Hendrickson and his wife, Sue Hendrickson, at Northwest 21st and Burnside Streets, Portland, Oregon.

By the terms of an agreement entered into by and between Burnside Realty, Inc., and Lloyd W.

Hendrickson and Sue Hendrickson, husband and wife, on or about April 29, 1944, Burnside Realty, Inc., as lessee, agreed to lease the properties at Northwest 21st and Burnside Streets, Portland, Oregon, from Mr. and Mrs. Hendrickson, as lessors, for a term of five years from April 19, 1944, at a monthly rental of \$1,500.00.

On or about April 26, 1944, Lloyd W. Hendrickson and Sue Hendrickson placed in escrow with the Bank of California, N. A., Portland, Oregon, the option agreement dated April 13, 1944, together with a warranty deed also dated April 13, 1944, and a bill of sale dated April 24, 1944, executed by them, whereby they conveyed title to the properties at Northwest 21st and Burnside Streets to you.

Prior to December 6, 1945, Lloyd W. Hendrickson and Sue Hendrickson were divorced. By virtue of an agreement entered into on or about that date your brother, B. Royce, acquired by assignment the rights, title and interest to the sum which would be due to Lloyd W. Hendrickson under the option agreement of April 13, 1944, in the event that you elected to exercise your right to purchase the property under that option.

On or about April 15, 1949, you advised the escrow agent, the Bank of California, N. A., Portland, Oregon, that you would exercise the option to purchase the property at Northwest 21st and Burnside Streets, Portland, in accordance with the terms of the option agreement dated April 13, 1944. Prior thereto Burnside Realty, Inc., had made sixty monthly payments of \$1,500.00 each, or \$90,000.00, to Lloyd W. and Sue Hendrickson or their assign-

ees. At the date of exercising the option, April 15, 1949, (1) the mortgage indebtedness on the property had been reduced to \$21,937.70, (2) by the terms of the option agreement dated April 13, 1944, the sum of \$6,531.15 was due to Sue Miller (formerly Sue Hendrickson) and (3) by the terms of the option agreement and by reason of the fact that your brother, B. Royce, had acquired by assignment the rights of Lloyd W. Hendrickson under that agreement, the sum of \$6,531.15 was due to B. Royce.

This office holds that you acquired the property at Northwest 21st and Burnside Streets, Portland, Oregon, by purchase in April, 1944, for a total consideration of \$125,000.00, computed as follows:

Sixty monthly payments of rent made by Burnside Realty, Inc., of \$1,500.00 each.....	\$ 90,000.00
Balance due on mortgage April 15, 1949.....	21,937.70
Payment to Sue Miller (formerly Sue Hendrickson).....	6,531.15
Liability to B. Royce.....	6,531.15
Total	<u>\$125,000.00</u>

This office further holds that the rental payments made by Burnside Realty, Inc., pursuant to the lease agreement dated April 29, 1944, on such property reduced by allowable depreciation, constituted taxable income to you. Taxable income reported by you for the years 1948 and 1949 has therefore been increased by rental payments in the amounts shown below:

Year	Rent	Depreciation	Increase in Income
1948	\$18,000.00	\$2,560.00	\$15,440.00
1949	8,200.00	2,560.00	5,640.00
Total	<u>\$26,200.00</u>	<u>\$5,120.00</u>	<u>\$21,080.00</u>

The records of this office show that income tax returns were filed in the name of your daughter, Eunice M. Royce, for the calendar years 1944 and 1946 to 1949 inclusive, which were executed by you as trustee. With respect to the year 1945, an unsigned return was filed.

In each of the returns filed by or for Eunice M. Royce for the years 1945 to 1949, inclusive, there was reported as her income the sum which the Yellow Cab Company of Seattle, Washington, reported in partnership returns of income filed by it for the fiscal years ended April 30, 1945 to 1949, inclusive, as income distributable to her.

This office holds that Eunice M. Royce was not a partner of Yellow Cab Company of Seattle for any of the years under review and that the sums reported by her as her distributive shares of partnership incomes are taxable to you.

Taxable Year Ended December 31, 1948
Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$ 72,136.09
Unallowable deductions and additional income:	
(a) Rental income	\$15,440.00
(b) Partnership income	41,668.22
(c) Capital gains	899.01
(d) Other income	56,000.00
	114,007.23
Total.....	\$186,143.32
Nontaxable income and additional deductions:	
(e) Contributions	97.84
Net income adjusted.....	\$186,045.48

Explanation of Adjustments

(a) On the basis of the facts and for the reasons stated above, it has been determined that as a result of the rental payments made during the year by Burnside Realty, Inc., you realized rental income not reported in your return in the amount of \$15,440.00.

(b) In your return filed for the calendar year 1948, you reported the sum of \$47,910.85 as being your distributive share of ordinary partnership incomes. It has been determined that your distributive share of net income from the partnerships is in the amount of \$89,579.07 and your reported net income has therefore been increased by the amount of \$41,668.22 computed as follows:

Name of Partnership	Income Reported	Income Adjusted
Yellow Cab Company, Portland.....	\$15,228.73	\$30,699.40
Yellow Cab Company, Seattle.....	19,123.35	45,320.90
Gray Line Motor Tours.....	10,600.78	10,600.78
Queen City Garage.....	2,940.19	2,940.19
Royce Brothers	14,830.12	14,830.12
East Side Buses.....	(14,812.32)	(14,812.32)
Totals.....	<u>\$47,910.85</u>	<u>\$89,579.07</u>
Partnership income reported.....		<u>47,910.85</u>
Increase		<u><u>\$41,668.22</u></u>

With respect to the Yellow Cab Company of Portland, your distributive share of ordinary partnership income has been increased from \$15,228.73 to \$30,699.40 by reason of the following adjustments:

Ordinary net income as reported in partnership return \$30,457.45
 Unallowable deductions and additional income:

(1) Depreciation	\$10,806.28	
(2) Cost of partnership interest.....	707.32	
(3) Accrued taxes	17,927.76	
(4) Repairs	1,500.00	30,941.36

Ordinary net income adjusted..... \$61,398.81

Your distributive share of the above adjusted income \$30,699.40

Reported 15,228.73

Increase \$15,470.67

(1) The depreciation allowable on taxicabs has been determined to be in the amount of \$27,784.89 rather than \$38,591.17 as claimed in the partnership return filed for the year 1949 and the ordinary net income has therefore been increased by the amount of \$10,806.28.

(2) The record shows that prior to August 1, 1942, Charles W. Keffer and C. H. Luton, were the owners of .659% and .906% interests, respectively, in the partnership Yellow Cab Company of Portland. On or about that date, August 1, 1942, you and your brother, B. Royce purchased the interests of these individuals under an agreement whereby, inter alia, each of the vendors was to receive 1% of the partnership net profits for a period of five years.

During the year under review, payments to them were charged to partnership operation as compensation. This office holds that payments in 1948, totaling \$707.32, made by the partnership, under the contract and in the manner referred to in the pre-

ceding paragraph were capital in nature and non deductible in computing partnership income.

(3) It has been determined that the City occupation tax in the amount of \$17,927.76 claimed as a deduction in the return filed for the calendar year 1948 was a contested liability and that the deduction is therefore not allowable in 1948.

(4) It has been determined that of the deduction claimed for repairs in the partnership return filed for the calendar year 1948, the amount of \$1,500.00 was incurred in preparing used cabs for sale. Such expenditures are therefore capital in nature and not deductible as an ordinary and necessary business expense.

(c) It has been determined that your taxable net capital gains for the calendar year 1948 are in the total amount of \$15,167.97 rather than \$14,268.96 as reported in your return. Your net income has therefore been increased by the amount of \$899.01, computed as follows:

(1) Yellow Cab Company of Seattle.....	\$2,052.15
(2) Yellow Cab Company of Portland.....	(653.14)
(3) Portland Meadows Stock.....	(500.00)
	<hr/>
Increase	\$ 899.01
	<hr/> <hr/>

(1) In your return filed for the calendar year 1948, you reported the amounts of \$345.98 and \$1,468.37 as your distributive share of the short-term capital gains and recognized long-term capital gains respectively of the partnership Yellow Cab Company of Seattle. It has been determined that your distributive share of recognized long-term cap-

ital gains from such partnership is in the amount of \$3,866.50 and that there were no short-term capital gains. Your reported net income has therefore been increased by the amount of \$2,052.15.

(2) In your return filed for the calendar year 1948, you reported the amount of \$1,125.15 as your distributive share of the recognized capital gains of the partnership Yellow Cab Company of Portland. It has been determined that the recognized capital gains of the partnership are in the amount of \$944.02 and that your distributive share is in the amount of \$472.01. Your net income has therefore been decreased by the amount of \$653.14.

(3) In your return filed for the calendar year 1949, you claimed as a loss, stock of Portland Meadows having a cost to you of \$100.00 and a note of Portland Meadows having a cost to you of \$900.00. On the basis that such stock and note became worthless in the year 1949, you reported a loss of \$100.00 on the stock as a long-term capital loss, of which 50% was taken into account and a loss of \$900.00 on the note as a short-term capital loss, of which 100% was taken into account. It has been determined that the above stock and note of Portland Meadows were acquired by you in 1946 under a plan of capitalization and that they both became worthless in 1948 rather than 1949. It is therefore held that the cost of such stock and note is allowable as a long-term capital loss for the calendar year 1948 and your reported capital gains are accordingly decreased by the amount of \$500.00 under the provisions of section 117(b) of the Internal Revenue Code.

(d) The records of this office show that during the calendar year 1948, you received 560,000 shares of the common stock of the Alder-Gold Copper Company having a fair market value of ten cents per share as compensation for services rendered. In your return for the calendar year 1948 you reported no income from this source. It is held that the receipt of such stock constitutes taxable income to you to the extent of its fair market value and your reported net income has therefore been increased by the amount of \$56,000.00.

(e) Since it has been determined that the income of the partnership Yellow Cab Company of Seattle reported by your daughter, Eunice M. Royce, is taxable to you, the distributive share of contributions allocated to her have been allowed to you as an additional deduction.

Computation of Income Tax

Net income as adjusted.....	\$186,045.48
Less: Excess of net long-term capital gain over net short-term capital loss.....	15,167.97
Ordinary net income.....	\$170,877.51
Less: Exemptions (4) x \$600.00.....	2,400.00
Income subject to tentative tax.....	\$168,477.51
One-half of such income if joint return.....	84,238.76
Tentative tax	53,780.56
Tax reduction:	
\$ 400.00 @ 17%.....	\$ 68.00
53,380.56 @ 12%.....	6,405.67
Combined normal tax and surtax.....	\$ 47,306.89

Computation of Income Tax—(Continued)

Partial tax liability (\$47,306.89 x 2).....	\$ 94,613.78
Plus: 50% of \$15,167.97.....	7,583.99
<hr/>	
Income tax liability.....	\$102,197.77
Income tax liability disclosed by return, Account No. 9119001.....	28,230.87
<hr/>	
Deficiency in income tax.....	\$ 73,966.90
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Taxable Year Ended December 31, 1949

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$ 50,619.18
Unallowable deductions and additional income:	
(a) Rental income	\$ 5,640.00
(b) Partnership income	29,729.80
(c) Capital gains	1,194.84
(d) Business income	11,632.86
(e) Cancellation of indebtedness.....	6,531.15
(f) Other income	9,761.40
<hr/>	
Total	\$115,109.23
Nontaxable income and additional deductions:	
(g) Contributions	97.92
<hr/>	
Net income adjusted.....	\$115,011.31
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(a) On the basis of the facts and for the reasons stated above, it has been determined that as a result of the rental payments made during the year by Burnside Realty, Inc., you realized rental income not reported in your return in the amount of \$5,640.00.

(b) In your return filed for the calendar year 1949, you reported the sum of \$37,745.45 as being your distributive share of ordinary partnership income. It has been determined that your distributive share of net income from partnerships is in the amount of \$66,040.24 and your reported net income

has therefore been increased by the amount of \$29,729.80 computed as follows:

Name of Partnership	Income Reported	Income Adjusted
East Side Buses, Portland, Oregon.....	\$ 9,369.16	\$ 9,369.16
Yellow Cab Company of Portland.....	(14,155.86)	(2,662.62)
Royce Brothers, Portland, Oregon.....	12,888.29	12,888.29
Yellow Cab Company of Seattle.....	12,412.01	30,648.57
Queen City Garage, Seattle, Washington	3,028.36	3,028.36
Gray Line Tours, Seattle, Washington	14,203.49	14,203.49
Totals.....	<u>\$37,745.45</u>	<u>\$67,475.25</u>
Partnership income reported.....		37,745.45
Increase		<u>\$29,729.80</u>

With respect to the Yellow Cab Company of Portland, your distributive share of ordinary partnership loss has been decreased from \$14,155.86 to \$2,662.62 by reason of the following adjustments:

Ordinary loss as disclosed by partnership return	(\$28,311.73)
Unallowable deductions and additional income:	
(1) Depreciation	\$ 3,400.42
(2) Accrued taxes	16,986.07
(3) Repairs	2,600.00
	<u>22,986.49</u>
Ordinary loss as adjusted	<u>(\$ 5,325.24)</u>
Your distributive share of the above adjusted loss	(\$ 2,662.62)
Reported	<u>(14,155.86)</u>
Increase	<u>\$11,493.24</u>

(1) It has been determined that the depreciation allowable on taxicabs is in the amount of \$36,990.52, rather than \$40,390.94 as claimed, and the ordinary net loss of the partnership has been decreased accordingly by the amount of \$3,400.42.

(2) It has been determined that the accrued

City occupational tax in the amount of \$16,986.07 claimed as a deduction in the partnership return filed for the calendar year 1949 was being contested by the partnership and that the deduction is therefore unallowable.

(3) It has been determined that of the deduction claimed for repairs in the partnership return filed for the calendar year 1949, the amount of \$2,600.00 was incurred in preparing such cabs for sale. Such expenditures are therefore capital in nature and not deductible as an ordinary and necessary business expense.

(c) In your return filed for the calendar year 1949, you reported net capital gains in the amount of \$17,413.12. It has been determined that the correct sum of your net capital gains is in the amount of \$18,607.96 and your net income has accordingly been increased by the amount of \$1,194.84 computed as follows:

	Capital Gains	
	Reported	Corrected
Oregon Motor Stages stock.....	\$22,236.03	\$22,235.23
Yellow Cab Company, Portland.....	5,932.94	3,991.47
Yellow Cab Company, Seattle.....	8,521.28	8,736.54
Royce Bros.	435.99	435.99
Gray Line Motor Tours.....	None	1,816.68
Total	\$37,126.24	\$37,215.91
50%	\$18,563.12	\$18,607.96
Less: Portland Meadows Notes — 100% (1,150.00)		None
Net capital gains	\$17,413.12	\$18,607.96
Reported		17,413.12
Adjustment		\$ 1,194.84

(d) In your return filed for the calendar year 1949, you claimed a bad debt loss in the amount of \$11,632.86. It has been determined that you had no bad debt loss during the year 1949 and your net income has accordingly been increased by the amount of \$11,632.86.

(e) The records of this office show that during the year 1949 you were granted a release from an escrow agreement pertaining to the purchase of property located on West Burnside Street in Portland, Oregon, without paying an amount of \$6,531.15 due on such property. It is held that the release from such payment constitutes taxable income to you in the year 1949 in the amount of \$6,531.15.

(f) The records of this office show that during the year 1949 you received 100,000 shares of the common stock of the Alder Gold-Copper Company having a fair market value equal to book value of \$0.0976140 per share as compensation for services rendered. In your return for the calendar year 1949 you reported no income from this source. It is held that the receipt of such stock constitutes taxable income to you to the extent of its fair market value, and your reported net income for the calendar year 1949 has therefore been increased by the amount of \$9,761.40.

(g) It has been determined that the income of the partnership Yellow Cab Company of Seattle, reported by your daughter, Eunice M. Royce, is taxable to you. The distributive share of contributions paid by the partnership and allocated to her

are therefore allowable to you as an additional deduction.

Computation of Income Tax			
Net income as adjusted.....		\$115,011.31	
Less: Excess of net long term capital gain over net short term capital loss.....		18,607.96	
			<hr/>
Ordinary net income.....	\$	96,403.35	
Less: Exemptions (\$600.00 x 4).....		2,400.00	
			<hr/>
Income subject to tentative tax.....	\$	94,003.35	
One-half of such income if joint return.....		47,001.68	
Tentative tax		24,661.21	
Tax reduction: \$ 400.00 @ 17%.....	\$	68.00	
24,261.21 @ 12%.....		2,911.35	
			<hr/>
Combined normal tax and surtax.....	\$	21,681.86	
Partial tax liability (\$21,681.86 x 2).....		43,363.72	
Plus: 50% of \$18,607.96.....		9,303.98	
			<hr/>
Income tax liability.....	\$	52,667.70	
Income tax liability disclosed by return.....		17,522.44	
			<hr/>
Deficiency in income tax.....	\$	35,145.26	
			<hr/>

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51526.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the petition.

2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegation contained in paragraph III of the petition.

4. Denies that he erred in his determination of the deficiencies in income tax as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5. (a) and (b) Admits the allegations contained in paragraph V(a) and (b) of the petition.

(c) Admits the allegations contained in the first sentence of paragraph V(c) of the petition. Denies the remaining allegations contained in paragraph V(c) of the petition.

(d) and (e) Admits the allegations contained in paragraph V(d) and (e) of the petition.

(f) and (g) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(f) and (g) of the petition.

(h), (i) and (j) Admits the allegations contained in paragraph V(h), (i) and (j) of the petition.

(k) Admits the allegations contained in the first sentence of paragraph V(k) of the petition. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph V(k) of the petition.

(l) Denies the allegations contained in paragraph V(l) of the petition.

(m) Admits that on or about November 28, 1942, the petitioner E. Royce and B. Royce purchased the partnership interest of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland. Denies the remaining allegations contained in paragraph V(m) of the petition.

(n) Admits the allegations contained in paragraph V(n) of the petition.

(o) Denies the allegations contained in paragraph V(o) of the petition.

(p) Admits the allegations contained in the first sentence of paragraph V(p) of the petition. Admits that the respective amounts of \$17,927.67 and \$16,986.07 were claimed by the Yellow Cab Company of Portland as deductions on its returns for the years 1948 and 1949. Denies the remaining allegations contained in paragraph V(p) of the petition.

(q) Admits that the respondent has disallowed \$1,500.00 for the year 1948 and \$2,600.00 for the year 1949 for expenses incurred by the Yellow Cab Company of Portland, a partnership, in preparing cabs for sale, which amounts were claimed by the partnership as deductions for said years. Denies the remaining allegations contained in paragraph V(q) of the petition.

(r) and (s) Denies the allegations contained in paragraph V (r) and (s) of the petition.

(t) Admits the allegations contained in the first two sentences of paragraph V(t) of the petition. Denies the remaining allegations contained in paragraph V(t) of the petition.

(u) Admits the allegations contained in the first

sentence of paragraph V(u) of the petition. Denies the remaining allegations contained in paragraph V(u) of the petition.

(v), (w) and (x) Denies the allegations contained in paragraph V(v), (w) and (x) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of the deficiencies be approved.

/s/ DANIEL A. TAYLOR, WHP,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Wilford H. Payne, Associate Appellate
Counsel, John D. Picco, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 23, 1954.

[Title of Tax Court and Docket No. 51527.]

PETITION

The above named petitioner hereby petitions the above entitled Court for a redetermination of the deficiency set forth by the respondent in his Notice of Deficiency (symbols ARC-AP:SF Port: VEV: 90D) dated the 28th day of September, 1953, and as a basis for this proceedings alleges as follows:

I.

The petitioner was married and residing with his wife, Dora F. Royce, in Portland, Multnomah County, Oregon, and filed his Federal Income Tax Return for the years involved with the Collector of Internal Revenue for the District of Oregon, at Portland, Oregon.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on September 28, 1953.

III.

The within controversy involves an asserted deficiency in Federal Income Taxes for the years and in the amounts as follows:

Year	Deficiency	Penalty Sec. 293(b)	Penalty under Sec. 294(d) (2)
1944.....	\$ 74,286.82		
1945.....	495,661.69		\$31,467.14
1946.....	143,714.83		
1947.....	112,261.13	\$56,130.57	7,011.97
	<hr/>	<hr/>	<hr/>
	\$825,924.47	\$56,130.57	\$38,479.11

IV.

In arriving at his conclusions as set forth in said Notice of Deficiency, the respondent committed the following errors:

As to the calendar year 1944:

1. The respondent erred in including in petitioner's income the sum of \$10,893.32, or any sum whatsoever, as rental payments made during 1944 by Burnside Realty, Inc., and in holding that petitioner derived any income whatsoever therefrom.

2. The respondent erred in increasing petitioner's capital gains in the amount of \$32,674.55, or any sum whatsoever.

3. The respondent erred in increasing petitioner's partnership income in the sum of \$52,366.85, or any sum whatsoever.

4. The respondent erred in reducing petitioner's capital loss carry-over by the amount of \$4,834.05, or any other amount.

As to the calendar year 1945:

1. The respondent erred in including in petitioner's income the sum of \$20,000.00, or any other amount, as being a distribution of the earnings and profits of Hippodrome Amusement Co. to petitioner.

2. The respondent erred in determining that petitioner realized taxable income in the amount of \$350,000.00, or any other amount, from the Oregon Motor Stages stock transaction.

3. The respondent erred in determining additional income to petitioner in the amount of \$8,054.80 and \$90.63, or any other amounts as additional income from the Oregon Motor Stages stock transaction.

4. The respondent erred in including in petitioner's income the sum of \$15,440.00, or any sum whatsoever, as rental payments made during 1945 by Burnside Realty, Inc., and in holding that petitioner derived any income whatsoever therefrom.

5. The respondent erred in determining that Dora F. Royce was not a valid partner in this and other years involved herein in the Yellow Cab Company of Portland and, therefore, that the sum

of \$130.29 reported by her as her share of capital gains from said company is includible in the income of petitioner.

6. The respondent erred in increasing petitioner's distributive share of the incomes of certain partnerships in the amount of \$142,006.34, or any other amount.

(a) The respondent erred in determining that petitioner's distributive share of partnership income from the Yellow Cab Company of Portland was \$68,026.05 greater than that reported by petitioner and more specifically, the Commissioner erred in determining that the distributive share of said partnership income reported by Dora F. Royce was the income of petitioner, that said partnership had claimed excessive depreciation in the amount of \$10,213.38, or any other amount, and that payments to Charles W. Keffer and C. H. Luton in the amount of \$5,349.32, or any other amount, in this or any other year, are not deductible in computing said partnership income.

(b) The respondent erred in determining petitioner's distributive share of partnership income from the Yellow Cab Company of Seattle should be increased in the amount of \$74,676.97, or any other amount, and more specifically that the distributive share of said partnership income reported by Dora F. Royce and Eunice Mae Royce was the income of petitioner in this or any other year herein involved.

7. The respondent erred in disallowing the amount of \$367.50, or any part of the \$500.00 de-

duction for contributions claimed by petitioner.

8. The respondent erred in asserting a penalty in any amount under Section 294(d)(2) Internal Revenue Code, or any other section.

As to the calendar year 1946:

1. The respondent erred in including in petitioner's income the sum of \$15,440.00, or any sum whatsoever, as rental payments made during 1946 by Burnside Realty, Inc., and in holding that petitioner derived any income therefrom.

2. The respondent erred in increasing petitioner's distributive share of income reported from certain partnerships in the amount of \$152,961.16, or any other amount.

(a) With respect to the partnership known as Yellow Cab Company of Portland, the respondent erred in determining that the partnership had claimed excessive depreciation in the amount of \$3,034.93, or any other amount, and in determining that the sum of \$4,986.38 paid to Charles W. Keffer and C. H. Luton was not deductible in computing partnership income.

As to the calendar year 1947:

1. The respondent erred in including in income of the marital community of petitioner and his wife the sum of \$15,440.00, or any sum whatsoever, as rental payments made during 1947 by Burnside Realty, Inc., and in holding that the marital community and/or petitioner derived any income therefrom.

2. The respondent erred in determining an increase in the distributive share of the marital com-

munity of petitioner and his wife of the income of certain partnerships in the amount of \$112,550.54, or any other amount.

(a) With respect to the partnership known as Yellow Cab Company of Portland, the respondent erred in determining the sum of \$9,750.67, or any other amount, to be excessive depreciation, in determining that the sum of \$2,908.60 paid to Charles W. Keffer and C. H. Luton was not deductible in computing partnership income, in determining that the sum of \$9,899.71, or any other amount, accrued as a City Revenue Tax was unallowable and in determining that the sum of \$7,500.00 was expended in preparing used cabs for sale was not deductible as an ordinary and necessary business expense.

3. The respondent erred in determining an increase in the amount of \$9,323.76, or any other amount, in petitioner's net capital gain from Yellow Cab Company, Seattle, and Yellow Cab Company, Portland.

4. The respondent erred in determining additional income in the amount of \$22,000.00, or any other amount, to petitioner from his receipt of 440,000 shares of common stock of Alder Gold-Copper Company.

5. The respondent erred in asserting a penalty in any amount under Section 294(d)(2) Internal Revenue Code, or any other section.

6. The respondent further erred in determining a 50% penalty or in any amount against petitioner under Section 293(b) of the Internal Revenue Code, or any other section.

V.

The facts upon which petitioner relies as a basis for this appeal are as follows:

(a) Petitioner is an individual residing in Portland, Oregon, and was, during all the years involved herein, and still is married to Dora F. Royce, and reported his income for Federal Income Tax purposes on the basis of cash receipts and disbursements and calendar year.

(b) The respondent has determined for each of the years herein involved that rental payments made by Burnside Realty, Inc., pursuant to a lease agreement dated April 29, 1944, constituted taxable income to petitioner.

(c) On the 13th day of April, 1944, petitioner obtained an option to acquire a parcel of real estate on N.W. 21st and Burnside Streets in Portland, Oregon, from L. W. Hendrickson and Sue Hendrickson, husband and wife. The option price was a favorable one and in order for petitioner to be entitled to exercise the option at the end of a 5 year period, it was provided in effect that petitioner acquire a tenant for a five year term for the building which would be willing to pay and agree to pay for a 5 year period the sum of \$1,500.00 per month.

(d) Burnside Realty, Inc., was incorporated on the 18th day of April, 1944, with an authorized capital stock of 30 shares and a par value of \$50.00 per share, or a total capitalization of \$1,500.00. Petitioner subscribed to 10 shares thereof, Harold Murphy subscribed to 10 shares thereof and A. L.

Schneider subscribed to 10 shares thereof and each agreed to pay for their stock the par value thereof.

(e) By a lease agreement dated the 29th day of April, 1944, Burnside Realty, Inc., agreed to lease from the said L. W. and Sue Hendrickson the building and equipment therein located at N.W. 21st and Burnside Streets for an agreed rental of \$1,500.00 per month and for a five year term.

(f) The said building leased by Burnside Realty, Inc., was a two story structure with the lower story occupied by commercial rental units and the upper floor was one large ballroom. Burnside Realty, Inc., was organized to engage in the business of operating the rental properties and of operating a ballroom. There was restaurant and ballroom equipment included in the building and included in the lease of a total reasonable value of approximately \$15,000.00. The reasonable rental value of the building for any one or any entity who or which wished to operate a rental property and a ballroom of this character was in excess of \$1,500.00 per month.

(g) On or about January 14, 1946, the said three stockholders of Burnside Realty, Inc., each surrendered $2\frac{1}{2}$ shares of his stock and the surrendered stock was then issued to Mr. Edward J. Cheney, an experienced ballroom operator.

(h) During all of the years herein involved, Burnside Realty, Inc., operated the rental properties and operated the ballroom therein and made the rental payments called for under the lease agreement with the said Hendricksons.

(i) At or about the time petitioner obtained the option to purchase the said real property from the Hendricksons, the Hendricksons executed a Deed and Bill of Sale to said property and the personal property located therein, to the petitioner and said documents were placed in escrow with the Bank of California. Petitioner exercised his option in 1949 to purchase the property in accordance with the terms thereof.

(j) The respondent has determined that petitioner's wife, Dora F. Royce, was not, for the years 1944 to 1947, inclusive, a bona fide partner in the partnership known as the Yellow Cab Company of Portland and that she was not for the years 1945 to 1947, inclusive, a bona fide partner in the partnership known as the Yellow Cab Company of Seattle and that the petitioner's daughter, Eunice M. Royce, was not, for the years 1945 to 1949, inclusive, a bona fide partner in the partnership known as the Yellow Cab Company of Seattle and that the income reported by the said Dora F. Royce and the said Eunice H. Royce for the said years was includible in the income of petitioner.

(k) In April, 1944, petitioner was a stockholder in the Yellow Cab Company of Seattle (Washington), a Washington corporation. Prior to April 30, 1944, petitioner made a gift of 402½ shares of his said stock to Dora F. Royce and of 700 shares of his said stock to himself as trustee under a formal declaration of trust for Eunice Mae Royce, his minor daughter.

(l) Said Yellow Cab Company was liquidated on

the 30th day of April, 1944, and all of its assets of every kind and character were conveyed to the then stockholders of record including the said Dora F. Royce and Eunice Mae Royce. On the 1st day of May, 1944, all of the persons who had been stockholders of said Yellow Cab Company, including the said Dora F. Royce and Eunice Mae Royce, conveyed the said property to the Yellow Cab Company of Seattle, a partnership. The said Dora F. Royce and Eunice Mae Royce really intended to be, and all members of the partnership intended them to be partners in said partnership and all the members thereof entered into a formal partnership agreement and publicly proclaimed themselves to be partners. They were and are partners for Federal Tax as well as other purposes.

(m) On the books of the said corporation, Yellow Cab Company of Seattle, prior to its dissolution, was an account titled "Good Will" in the amount of \$150,738.54. By action of the Board of Directors of said company at a meeting held on the 7th day of April, 1944, the Directors properly determined that all except the item of \$6,412.30 carried as good will had no tangible or realizable value, and they instructed the company's accountant to write off this item as having no value except for said sum of \$6,412.30.

(n) The returns of petitioner, Dora F. Royce and Eunice Mae Royce for the year 1944 included the gain realized from the liquidation of said Yellow Cab Company based upon the elimination of said item of Good Will to the extent set forth and

a reduction of the company's assets to their then fair market value.

(o) Prior to August 1, 1942, petitioner transferred 14,000 shares of his stock in the Yellow Cab Company, an Oregon corporation, to Dora F. Royce, petitioner's wife. Said transfer of stock was complete, irrevocable and without reservation and Dora F. Royce became the owner of said stock which represented 23.06% of the total stock outstanding.

(p) On July 31, 1942, the said corporation was liquidated and on August 1, 1942, the Yellow Cab Company of Portland, a partnership, was formed. This partnership was composed of the persons who were stockholders of record of the said corporation on the date of liquidation. Each said persons transferred to the partnership his or her interest in the assets received by them from the liquidation of the Yellow Cab Company to the partnership. A formal partnership agreement was entered into and duly executed and the public was informed of the formation of the partnership and of its existence as required by law.

(q) Dora F. Royce intended to be, and the members of the partnership intended her to be a partner in said Yellow Cab Company of Portland, and she was and still is a partner therein for Federal Tax as well as other purposes.

(r) On or about the 28th day of November, 1942, petitioner and B. Royce purchased the partnership interests of Charles Keffer and C. H. Lutton in the Yellow Cab Company of Portland for a

cash consideration. At the same time, the partnership entered into a profit sharing agreement with the said Charles Keffer and C. H. Luton whereby each would be entitled to a certain percentage of the partnership profits thereafter as long as it was mutually agreeable that the said individuals continued in the employment of the partnership. Percentage of profit payments made under these agreements were properly deducted by the partnership in computing its net income for all the years herein involved.

(s) Petitioner properly carried over a capital loss to the year 1944 in the amount of \$12,154.35.

(t) The Hippodrome Amusement Company, an Oregon corporation, owns property in Seaside, Oregon, located in the center of the city. For a number of years the company known as Oregon Motor Stages has been having difficulty with the sale of tickets in that city and the stockholders of the Hippodrome Amusement Company have been contemplating putting up a modern building on their Seaside property which would house the present facilities and accommodations and would also provide a downtown ticket office for said Oregon Motor Stages. The Hippodrome company had, therefore, been accumulating its funds for that purpose, but the construction of a building in accordance with the plan of the company was being held in abeyance in the anticipation that building conditions would improve sufficiently so as to enable the company to construct a building upon a more reasonable basis of cost.

(u) The Hippodrome Amusement Company advanced to petitioner in 1945 the sum of \$20,000.00 from its said building funds as a temporary loan and/or until such time as the said company's building program could be put into effect. This sum of \$20,000.00 was not a dividend but was borrowed by petitioner from the company and petitioner is fully obligated to return it to the company upon demand. There are three other stockholders in the Hippodrome Amusement Company besides petitioner, and said loan bore no relation to the stock ownership.

(v) During the year 1945, petitioner and a number of associates entered into negotiations with the then stockholders of Oregon Motor Stages for the acquisition of all of the capital stock of said corporation. There were outstanding at that time 750 shares of stock of said company and the price upon which negotiations were based was \$1,000.00 per share. Petitioner, B. Royce, Albert L. Schneider and R. T. Jacob began preparations for the acquisition of said stock whereupon one L. R. Bentson of Vancouver, B. C., who was a relative of petitioner and B. Royce, informed the group that he desired to acquire a portion of the stock of said company and he agreed to and did purchase 350 shares of said stock.

(w) With regard to the acquisition of his stock, the said Mr. Bentson advised the group that his funds were in Canada and were blocked and, therefore, that it would be necessary for him to make arrangements in the States to finance his purchase. Accordingly, a loan was negotiated on his behalf

with the American Business Credit Corporation. Petitioner loaned his stock as an accommodation to be pledged with Mr. Bentson's stock as security for said loan, and petitioner affixed his signature to the note as guarantor for Mr. Bentson.

After the conclusion of World War II in August, 1945, Mr. Bentson became apprehensive that the earnings of Oregon Motor Stages might be drastically curtailed and that his investment might not prove as profitable as he had anticipated. Mr. Bentson thereupon made an offer to the corporation to surrender his 350 shares of stock upon the corporation paying the interest on his obligation and liquidating the loan obtained from the American Business Credit Corporation. The Board of Directors of the corporation determined that the purchase of the stock by the company was the prudent course to take and the offer of Mr. Bentson was accepted. Upon the surrender of his shares of stock, Oregon Motor Stages issued to Mr. Bentson a check for the sum of \$350,000.00 which said check the said Mr. Bentson delivered to the American Business Credit Corporation in payment of his loan.

(x) Petitioner did not receive any portion of the stock surrendered to the company by Mr. Bentson nor did he receive any payment of any kind from the corporation in connection with the surrender of the stock by Mr. Bentson.

(y) In addition to the \$350,000.00 paid to Mr. Bentson by the Oregon Motor Stages, the said company paid interest to the American Business Credit

Corporation and attorneys fees in the respective amounts of \$8,054.80 and \$2,135.41. No part of said payments were made either directly to petitioner or indirectly in satisfaction of petitioner's personal liability.

(z) For the year 1945 the Commissioner determined that the Yellow Cab Company of Portland had claimed excessive depreciation in the amount of \$10,213.38, in the amount of \$3,034.93 for the year 1946 and in the amount of \$9,750.67 for the year 1947.

(aa) The Yellow Cab Company of Portland has, for a number of years, followed the consistent practice of using a straight line method of depreciation and completely writing off all of its taxi-cabs over a four year period. The depreciation claimed by the Yellow Cab Company of Portland constituted a reasonable allowance for exhaustion, wear and tear (including a reasonable allowance for obsolescence), under normal circumstances.

(bb) During the calendar year 1945 petitioner expended the total amount of \$500.00 in making charitable contributions and properly claimed that amount on his return for said year as a contributions deduction.

(cc) During the calendar year 1947, the City of Portland assessed a city 2% gross revenue tax on the partnership known as the Yellow Cab Company of Portland in the amount of \$9,899.71. This said sum was accrued on the books of the Yellow Cab Company of Portland in the year 1947 and was claimed by said partnership as a deduction on its

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(bb) During the calendar year 1945 petitioner expended the total amount of \$500.00 in making charitable contributions and properly claimed that amount on his return for said year as a contributions deduction.

(cc) During the calendar year 1947, the City of Portland assessed a city 2% gross revenue tax on the partnership known as the Yellow Cab Company of Portland in the amount of \$9,899.71. This said sum was accrued on the books of the Yellow Cab Company of Portland in the year 1947 and was claimed by said partnership as a deduction on its

return for the said year, in accordance with the method of accounting regularly employed in keeping its books of account.

(dd) The respondent has disallowed \$7,500.00 of the repair expenses claimed by the Yellow Cab Company of Portland, a partnership, as a deduction for the calendar year 1947, said disallowance being based upon the theory that the said company made capital expenditures of \$100.00 per cab sold in that year in preparing and painting each cab for sale.

(ee) The Yellow Cab Company of Portland, a partnership, maintains its own garage and staff of mechanics and makes any and all repairs necessary to its cabs therein. The repair and painting expenses incurred by the said company represent repairs required in the ordinary course of business, and were charged to the account of repairs and maintenance in accordance with the method of accounting regularly employed and established many years before.

(ff) All proceeds of sales of cabs made by the Yellow Cab Company of Portland, a partnership, during the calendar year 1947 are correctly recorded on the books of the said company and were properly reported on the tax return of the said company for the calendar year 1947.

(gg) Any common stock of Alder Gold-Copper Company received by petitioner in the calendar year 1947 represented stock issued to him for monies paid in or advanced by him on behalf or in connection with the said corporation. Also, the

said common stock of the said corporation did not have any fair or market value during said year 1947. Petitioner did not receive any said stock as compensation for services.

(hh) In July, 1946, petitioner purchased common and preferred stock in Oregon Distillery Co. of Hood River, and paid the sum of \$10,000.00 therefor.

(ii) On November 2, 1947, the said Oregon Distillery Co. of Hood River became insolvent and its affairs were wound up. Petitioner's common and preferred stock in said company became worthless in said year, but petitioner inadvertently failed to claim any loss in connection therewith on his return for said year.

(jj) For the years 1945 and 1947, petitioner reported on his estimated tax the full amount of tax estimated to be due and owing for said years and the penalty proposed for said years is without foundation.

Wherefore, petitioner prays that the Court hear this proceeding and determine that there is no deficiency in income taxes for any of the years 1944, 1945, 1946 and 1947 and that petitioner is not subject to any penalties determined by the respondent or any part thereof.

/s/ R. T. JACOB.

Of Counsel:

Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

REGIONAL

1112 Cascade Building

Portland 4, Oregon

September 28, 1953

ARC-AP:SF

Port:VEV:90D

Mr. Ezra Royce

628 N.W. Sixth Avenue

Portland 9, Oregon

Dear Mr. Royce:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944, 1945, 1946, and 1947, discloses deficiencies in the total amount of \$825,924.47 and penalties in the total amount of \$94,609.68, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D.C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commission, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner,

/s/ By A. N. Williams,
Associate Chief, Appellate Division

Enclosures:

Statement

Form 1276 Agreement Form 870

VEVlene la

STATEMENT

Mr. E. Royce

628 N. W. Sixth Avenue

Portland, Oregon

Income tax liability for the taxable years ended
December 31, 1944, 1945, 1946 and 1947.

Year	Deficiency	Penalty Sec. 293(b)	Penalty Sec. 294(d) (2)
1944.....	\$ 74,286.82		
1945.....	495,661.69		\$31,467.14
1946.....	143,714.83		
1947.....	112,261.13	\$56,130.57	7,011.97
Totals....	\$825,924.47	\$56,130.57	\$38,479.11

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 12, 1951, and to your protest dated September 5, 1951.

The 50% penalty has been asserted for the taxable year ended December 31, 1947, in accordance with the provisions of Section 293(b) of the Internal Revenue Code.

The 6% penalty for substantial underestimate of estimated tax has been asserted for the taxable years ended December 31, 1945 and 1947, in accordance with the provisions of Section 294 (d)(2) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Robert T. Jacob, 917 Public Service Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

The records of this office show that on and prior to April 13, 1944, Lloyd W. Hendrickson and Sue Hendrickson, husband and wife, were the owners of certain real and personal properties located at Northwest 21st and Burnside Streets, Portland, Oregon, the real property being otherwise described as a portion of Block 31, Kings Second Addition to the City of Portland. On that date, April 13, 1944, Mr. and Mrs. Hendrickson executed a document designated as an "Option to Buy" whereby they gave you an option to purchase said real and personal properties on or prior to April 19, 1949, in accordance with the terms and conditions therein stated. The option agreement recited that it was

“understood that said property” was then “under lease for a term” which would expire on April 19, 1949, and that the option therein provided for could be exercised only “after all rentals reserved in said leases” were fully paid at the time provided in the lease or in advance thereof. The option agreement further stated that it was expected that part of the obligations then outstanding against the property would remain unpaid at the expiration of the term of the lease. By the terms of the agreement, if you exercised your election to purchase, you would be required to pay the sum of \$35,000.00 less any outstanding indebtedness assumed by you, plus interest thereon.

On or about April 18, 1944, you, A. L. Schneider and Harold Murphy organized the Burnside Realty, Inc., under the laws of Oregon, with an authorized capital stock of 30 common shares, par value \$50.00 per share, which was issued to you, Mr. Schneider and Mr. Murphy in equal one-third proportions. This corporation was purportedly organized for the purpose of continuing the operation of rental and amusement businesses theretofore conducted in and on the premises owned by Lloyd W. Hendrickson and his wife, Sue Hendrickson, at Northwest 21st and Burnside Streets, Portland, Oregon.

By the terms of an agreement entered into by and between Burnside Realty, Inc. and Lloyd W. Hendrickson and Sue Hendrickson, husband and wife, on or about April 29, 1944, Burnside Realty, Inc., as lessee, agreed to lease the properties at

Northwest 21st and Burnside Street, Portland, Oregon, from Mr. and Mrs. Hendrickson, as lessors, for a term of five years from April 19, 1944, at a monthly rental of \$1,500.00.

On or about April 26, 1944, Lloyd W. Hendrickson and Sue Hendrickson placed in escrow with the Bank of California, N.A., Portland, Oregon, the option agreement dated April 13, 1944, together with a warranty deed also dated April 13, 1944, and a bill of sale dated April 24, 1944, executed by them, whereby they conveyed title to the properties at Northwest 21st and Burnside Streets to you.

Prior to December 6, 1945, Lloyd W. Hendrickson and Sue Hendrickson were divorced. By virtue of an agreement entered into on or about that date your brother, B. Royce, acquired by assignment the rights, title and interest to the sum which would be due to Lloyd W. Hendrickson under the option agreement of April 13, 1944, in the event that you elected to exercise your right to purchase the property under that option.

On or about April 15, 1949, you advised the escrow agent, the Bank of California, N.A., Portland, Oregon, that you would exercise the option to purchase the property at Northwest 21st and Burnside Streets, Portland, in accordance with the terms of the option agreement dated April 13, 1944. Prior thereto Burnside Realty, Inc., had made sixty monthly payments of \$1,500.00 each, or \$90,000.00 to Lloyd W. and Sue Hendrickson or their assign-

ees. At the date of exercising the option, April 15, 1949, (1) the mortgage indebtedness on the property had been reduced to \$21,937.70, (2) by the terms of the option agreement dated April 13, 1944, the sum of \$6,531.15 was due to Sue Miller (formerly Sue Hendrickson) and (3) by the terms of the option agreement and by reason of the fact that your brother, B. Royce, had acquired by assignment the rights of Lloyd W. Hendrickson under that agreement, the sum of \$6,531.15 was due to B. Royce.

The Bureau holds that you acquired the property at Northwest 21st and Burnside Streets, Portland, Oregon, by purchase in April, 1944 for a total consideration of \$125,000.00, computed as follows:

Sixty monthly payments of rent by Burnside Realty, Inc. of \$1,500.00 each.....	\$ 90,000.00
Balance due on mortgage April 15, 1949.....	21,937.70
Payment to Sue Miller (formerly Sue Hendrickson).....	6,531.15
Liability to B. Royce.....	6,531.15
Total	\$125,000.00

The Bureau further holds that the rental payments made by Burnside Realty, Inc., pursuant to the lease agreement dated April 29, 1944, on such property, reduced by allowable depreciation, constitutes taxable income to you. Taxable income reported for the years 1944 to 1947, inclusive, has, therefore, been increased by rental payments in the amounts shown below:

Year	Rent	Depreciation	Increase in income
1944.....	\$12,600.00	\$1,706.68	\$10,893.32
1945.....	18,000.00	2,560.00	15,440.00
1946.....	18,000.00	2,560.00	15,440.00
1947.....	18,000.00	2,560.00	15,440.00
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Total	\$66,600.00	\$9,386.68	\$57,213.32
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The records of this office show (1) that your wife, Dora F. Royce, filed separate income tax returns for the years 1944 to 1947, inclusive, (2) that in her returns for the years 1944 to 1947, inclusive, she reported as her share of the income of the Yellow Cab Company of Portland, Oregon, her distributive share of the income of that partnership shown by the partnership returns of income filed by it for such calendar years, and (3) that in her returns for the years 1945 to 1947, inclusive, she reported as her share of the income of the Yellow Cab Company of Seattle, Washington, the portion of the income of that partnership shown by the partnership return of income filed by it for the fiscal years ended April 30, 1945 to 1947, inclusive, as distributable to her.

The records of this office further show that income tax returns were filed in the name of your daughter, Eunice M. Royce, for the calendar years 1944 and 1946 to 1949, inclusive, which were executed by you as trustee; with respect to the year 1945, an unsigned return form was filed.

In each of the returns filed by or for Eunice M. Royce for the years 1945 to 1949, inclusive, there was reported as her income the sum which the Yel-

low Cab Company of Seattle, Washington, reported in partnership returns of income filed by it for the fiscal years ended April 30, 1945 to 1949, inclusive, as income distributable to her.

This office holds that neither Dora F. Royce nor Eunice M. Royce was a bona fide partner in either the Yellow Cab Company of Portland or the Yellow Cab Company of Seattle for any of the years under review and that the sums reported by them as their distributive shares of partnership incomes are taxable to you.

Taxable Year Ended December 31, 1944

Adjustments to Net Income

Net income as disclosed by return, Form 1040..... \$ 87,106.76

Unallowable deductions and additional income:

(a) Rental income	\$10,893.32	
(b) Capital gains	32,674.55	
(c) Partnership income	52,366.85	95,934.72

Total		\$183,041.48
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Non-taxable income and additional deductions:

(d) Contributions	\$ 58.71	
(e) Taxes	1.00	
(f) Miscellaneous02	59.73

Net income adjusted		\$182,981.75
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Explanation of Adjustments

(a) On the basis of the facts and for the reasons stated above, it has been determined that as a result of rental payments made during the year by Burnside Realty, Inc., you realized income not reported in your return in the amount of \$10,893.32.

(b) In your return for the calendar year 1944, you reported a net loss from the sales or exchanges of capital assets in the amount of \$535.23. It has

been determined that you in fact realized a net gain from such transaction in the amount of \$32,139.32. Therefore, your net income has been increased by the amount of \$32,674.55, computed as follows:

(1) Gain on liquidation of Yellow Cab Co. of Seattle	\$26,763.68
(2) Partnership capital gain (Yellow Cab Co. of Portland) reported by Dora F. Royce	1,076.82
(3) Decrease in capital loss carry-over.....	4,834.05
Total	<u>\$32,674.55</u>

(1) This office holds that you realized in 1944 a capital gain on the liquidation of the Yellow Cab Co. of Seattle in the amount of \$57,954.70, and that one-half of that sum, or \$28,977.35, is to be taken into account in accordance with the provisions of Section 117 of the Internal Revenue Code. Inasmuch as you reported \$2,213.67 on the liquidation of this corporation, your reported capital gain has been increased by \$26,763.68.

(2) In her return for the year 1944, your wife, Dora F. Royce, reported the sum of \$1,076.82 as her share of the capital gains realized during the taxable year by the Yellow Cab Co. of Portland. Since this office holds that Mrs. Royce was not a valid partner, the sum reported by her as capital gain is considered taxable to you.

(3) In your return you reported a capital loss carry-over of \$12,154.35. It has been determined that the correct carry-over is \$7,320.31. The carry-over loss claimed has, therefore, been reduced by \$4,834.05.

(c) In your return filed for the calendar year 1944, you reported the sum of \$58,483.85 as your distributive share of ordinary partnership income

reported in the return filed by the Yellow Cab Company, Portland, Oregon, for the calendar year 1944. It has been determined that your correct distributive share of such partnership income is \$110,850.70, computed as follows:

Distributive share reported.....	\$ 58,483.85
(A) Distributive share reported by your wife	50,060.79
(B) Cost of partnership interest.....	2,306.06
	<hr/>
Corrected distributive share.....	\$110,850.70

Your taxable income as reported has, therefore, been increased by \$52,366.85.

(A) For the reasons heretofore stated, this office holds that the income reported by your wife, Dora F. Royce, as her distributive share of the income of the partnership, Yellow Cab Company of Portland, is taxable to you.

(B) The record shows that prior to August 1, 1942, Charles W. Keffer and C. H. Luton, were the owners of .659% and .906% interests, respectively, in the partnership, Yellow Cab Company of Portland. On or about that date, August 1, 1942, you and your brother, B. Royce, purchased the interests of these individuals under an agreement whereby inter alia, each of the vendors was to receive one percent of the partnership net profits for a period of five years. During the year under review, payments to them were charged to partnership operations as compensation.

This office holds that payments made by the partnership under the contract and in the manner referred to in the preceding paragraph were capi-

tal in nature and not deductible in computing partnership income. The effect of this finding is to increase your reported income for the year 1944 by \$2,306.06.

(d) Since it has been determined that the income of the partnership Yellow Cab Company, Portland, Oregon, reported by your wife, Dora F. Royce, is taxable to you, the distributive share of partnership contributions paid by such partnership and claimed as a deduction in the separate return filed by your wife is held to be allowable to you as a deduction in the amount of \$58.71.

(e) Due to a mathematical error in your return, you claimed deduction for taxes totaling \$644.16, understated in the amount of \$1.00. An additional deduction in that amount is allowed.

(f) You claimed miscellaneous deductions in your return filed for the calendar year 1944 which total \$286.76. By reason of an error in addition the total of such expenses was shown in the amount of \$286.74. An additional deduction of \$.02 is allowable.

Computation of Income Tax

Net income adjusted.....	\$182,981.75
Less: Excess of net long-term capital gain over net short-term capital loss.....	32,139.32
<hr/>	
Ordinary net income	\$150,842.43
Less: Normal tax exemption.....	500.00
<hr/>	
Balance subject to normal tax.....	\$150,342.43
Normal tax—3% of \$150,342.43.....	4,510.27
Ordinary net income.....	\$150,842.43
Less: Surtax exemptions.....	1,500.00
<hr/>	
Balance subject to surtax.....	\$149,342.43

Computation of Income Tax—(Continued)

Surtax	\$111,234.76
Partial tax	\$115,745.03
Plus: 50% of \$32,139.32.....	16,069.66
Income tax liability.....	\$131,814.69
Income tax liability disclosed by return, Account No. N9-9000025.....	57,527.87
Deficiency in income tax.....	<u>\$ 74,286.82</u>

Taxable Year Ended December 31, 1945

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$120,480.98
Unallowable deductions and additional income:	
(a) Dividends (Hippodrome Amusement Co.)	\$ 20,000.00
(b) Income realized from Oregon Motor Stages stock transaction	350,000.00
(c) Other income (Oregon Motor Stages)	8,145.43
(d) Rental income	15,440.00
(e) Capital gains	130.29
(f) Partnership income	142,006.34
(g) Contributions	367.50
Total	<u>\$656,570.54</u>
Non-taxable income and additional deductions:	
(h) Interest expense	<u>7,479.45</u>
Net income adjusted.....	<u>\$649,091.09</u>

Explanation of Adjustments

(a) It has been determined that on December 28, 1945, the Hippodrome Amusement Company, an Oregon corporation, of which you owned approximately 61.76% of the outstanding stock, issued its check payable to you in the amount of \$20,000.00 which has not been repaid. This office holds that

such payment was in effect a distribution of the earnings and profits of such corporation to you, and as such is taxable to you as a dividend. Your net income has accordingly been increased by the amount of \$20,000.00.

(b) The records of this office show that prior to July 2, 1945, you, your brother B. Royce, Robert T. Jacob, Fred C. Niederkrome and A. L. Schneider negotiated for the purchase of the capital stock of Oregon Motor Stages, Portland, Oregon, an Oregon corporation engaged in the business of bus transportation. The outstanding stock of that corporation then consisted of 750 common shares, par value \$100.00 a share.

As a result of the negotiations referred to above, on or about July 2, 1945, you and your associates purchased shares of Oregon Motor Stages in the number and at the cost shown below:

	Shares	Cost
E. Royce	145	\$145,000.00
B. Royce	50	50,000.00
Robert T. Jacob.....	100	100,000.00
Fred C. Niederkrome.....	55	55,000.00
A. L. Schneider.....	50	50,000.00
	<hr/>	<hr/>
Total	400	\$400,000.00
	<hr/>	<hr/>

In accordance with the plan adopted, the remaining 350 shares of Oregon Motor Stages stock were acquired in the name of your uncle, L. R. Bentson, 411 East 15th Street, North Vancouver, B. C. in consideration of payment of \$350,000.00 in cash. Such payment was made from the proceeds of a

loan obtained by you, acting for yourself and your above-named associates, through the Portland Branch of the American Business Credit Corporation, New York City, on a 90-day note which was signed by you and L. R. Bentson and which was collateralized by deposit of the entire 750 shares of stock of Oregon Motor Stages.

On or about September 6, 1945, pursuant to the plan adopted by you and your associates, as aforesaid, Oregon Motor Stages acquired the 350 shares of its own stock then standing in the name of L. R. Bentson and issued its check to him in the sum of \$350,000.00. This check was immediately endorsed and delivered to the American Business Credit Corporation in satisfaction of the 90-day note signed by you and L. R. Bentson.

It has been determined that it was not intended that L. R. Bentson should acquire, nor did he at any time acquire, any bona fide or actual beneficial interest in the stock of Oregon Motor Stages.

It has been further determined that the accumulated earnings and profits of Oregon Motor Stages available for distribution as dividends during the year 1945 were in excess of \$350,000.00.

This office holds that the transaction whereby Oregon Motor Stages acquired 350 shares of its capital stock, which were issued in the name of L. R. Bentson, for the sum of \$350,000.00, was consummated at such a time and in such a manner as to result in the realization of taxable income to you in the amount of \$350,000.00.

(c) It has been further determined that in connection with the transaction whereby Oregon Motor Stages acquired 350 shares of its stock in the manner stated above, that corporation paid interest to the American Business Credit Corporation and attorney fees in the respective total amounts of \$8,054.80 and \$2,135.41. With respect to these sums, this office holds that to the extent of \$8,054.80 and \$90.63 respectively, the payment of interest and attorney fees was in satisfaction of your personal liability, incurred in connection with the transactions whereby you acquired the stock of Oregon Motor Stages. Your reported income has, therefore, been increased by \$8,145.43.

(d) On the basis of the facts and for the reasons stated above, it has been determined that as a result of rental payments made during the year by Burnside Realty, Inc., you realized rental income not reported in your return in the amount of \$15,440.00.

(e) In her return for the year 1945, your wife, Dora F. Royce, reported the sum of \$130.29 as her share of capital gains realized during the taxable year by the Yellow Cab Company of Portland. Since this office holds that Mrs. Royce was not a valid partner, the sum reported by her as capital gain is considered taxable to you.

(f) In your return for the calendar year 1945, you reported the sum of \$113,530.63 as your distributive share of the incomes of certain partnerships in which you were interested. The following

tabulation shows the names and addresses of such partnerships, your distributive share of incomes reported, the incomes as determined by this office and the increase or decrease:

Name of Partnership	Income Reported	Income Corrected	Increase (Decrease)
Yellow Cab Company, Portland, Oregon	\$ 79,381.28	\$138,407.33	\$ 68,026.05
Yellow Cab Company, Seattle, Washington	20,304.80	94,981.77	74,676.97
Bend Recreation Center Bend, Oregon	(1,365.63)	(1,991.52)	(625.89)
Pilot Butte Transit Lines Bend, Oregon	x x x	(70.79)	(70.79)
Gray Line Motor Tours Seattle, Washington	17,973.14	17,973.14	
Royce Brothers Portland, Oregon	3,307.22	3,307.22	
Queen City Garage Seattle, Washington	2,929.82	2,929.82	
Totals	\$113,530.63	\$255,536.97	\$142,006.34

The adjustments of your income attributable to the revision of the partnership income of the Yellow Cab Company of Portland and the Yellow Cab Company of Seattle are shown below:

Yellow Cab Company of Portland	
Ordinary net income reported in partnership return	\$261,251.95
Unallowable deductions and additional income:	
(1) Excessive depreciation	10,213.38
(2) Cost of partnership interest.....	5,349.32
Ordinary net income adjusted.....	\$276,814.65
Your distributive share of the above adjusted income	\$138,407.33

(1) It has been determined that the depreciation allowable on taxicabs is in the amount of \$1,764.80

rather than \$11,978.18 as claimed and the net income of the partnership has been increased accordingly in the amount of \$10,213.38.

(2) On the basis of the facts and for the reasons stated heretofore, it has been determined that the sum of \$5,349.32 charged to the partnership operation for the year 1945 as compensation to Charles W. Keffer and C. H. Luton, was capital in nature and not deductible in computing partnership income.

Yellow Cab Company of Seattle

Distributive share reported.....	\$20,304.80
(1) Distributive share reported by your wife.....	27,264.06
(2) Distributive share reported by your daughter, Eunice M. Royce	47,412.61
<hr/>	
Corrected distributive share.....	\$94,981.77*

*Total reported understated by \$.30.

(1) and (2). For the reasons heretofore stated, this office holds that the income reported by your wife, Dora F. Royce and your daughter, Eunice M. Royce, as their distributive shares of the income of the partnership Yellow Cab Company of Seattle is taxable to you.

(g) In your return for the calendar year 1945, you claimed a deduction for contributions in the amount of \$500.00. Inasmuch as you have failed to substantiate any such deductions in excess of your distributive share of contributions paid by the partnership Yellow Cab Company of Portland, Oregon, in the amount of \$132.50, the sum of \$367.50 is held to be unallowable.

(h) It has been determined that of the amount

of \$8,054.80 heretofore held under paragraph (c) above to be taxable to you, the sum of \$7,479.45 is allowable as a deduction for interest paid in 1945.

Computation of Income Tax

Net income as adjusted.....		\$649,091.09
Less: Excess of net long-term capital gain over net short-term capital loss		2,502.39
Ordinary net income.....		\$646,588.70
Less: Normal tax exemption.....		500.00
Balance subject to normal tax.....		\$646,088.70
Normal tax (3% of \$646,088.70).....		19,382.66
Ordinary net income.....	\$646,588.70	
Less: Surtax exemptions.....	1,500.00	
Balance subject to surtax.....	\$645,088.70	
Surtax on \$200,000.00 equals.....	156,820.00	
\$445,088.70 @ 91% equals....	405,030.72	\$561,850.72
Partial tax		\$581,233.38
Plus (50% of \$2,502.39).....		1,251.20
Income tax liability.....		\$582,484.58
Income tax liability disclosed by return, Account No. 3200604.....		86,822.89
Deficiency in income tax.....		\$495,661.69
Penalty, Sec. 294(d)(2) Internal Revenue Code		
Income tax liability as adjusted.....		\$582,484.58
Less: Withholding tax.....	None	
Paid on estimated declaration.....	\$58,032.28	58,032.28
Difference		\$524,452.30
Penalty (6% of \$524,452.30).....		31,467.14

Taxable Year Ended December 31, 1946

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$118,857.41
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Unallowable deductions and additional income:	
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(a) Rental income	\$ 15,440.00
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(b) Partnership income	152,961.16	168,401.16
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Total	\$287,258.57
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Non-taxable income and additional deductions:	
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(c) Capital gains	\$468.06
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(d) Contributions	171.30
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(e) Interest expense	288.20	\$ 927.56
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Net income adjusted	\$286,331.01
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Explanation of Adjustments

(a) On the basis of the facts and for the reasons stated above, it has been determined that as a result of the rental payments made during the year by Burnside Realty, Inc., you realized rental income not reported in your return in the amount of \$15,440.00.

(b) In your return for the calendar year 1946, you reported the sum of \$110,559.98 as your distributive share of the incomes of certain partnerships in which you were interested. The following tabulation shows the names and addresses of such partnerships, your distributive share of incomes reported, the incomes as determined by this office and the increase or decrease.

Name of Partnership	Income Reported	Income Corrected	Increase (Decrease)
Yellow Cab Company Portland, Oregon	\$ 65,584.76	\$125,734.41	\$ 60,149.65
Yellow Cab Company Seattle, Washington	23,480.88	116,565.18	93,084.30

Name of Partnership	Income Reported	Income Corrected	Increase (Decrease)
Gray Line Motor Tours Seattle, Washington	12,598.66	12,598.66	
Royce Brothers Portland, Oregon	5,989.42	5,989.42	
Queen City Garage Seattle, Washington	2,906.26	3,014.95	108.69
Bend Recreation Center Bend, Oregon		(381.48)	(381.48)
Totals	\$110,559.98	\$263,521.14	\$152,961.16

The adjustments of your income attributable to the revision of the partnership income of Yellow Cab Company of Portland are shown below:

Yellow Cab Company of Portland

Ordinary net income reported in accordance with return	\$243,447.71
Unallowable deductions and additional income:	
(1) Excessive depreciation	3,034.93
(2) Cost of partnership interest.....	4,986.38
Ordinary net income adjusted.....	\$251,468.82
Your distributive share of the above adjusted income	\$125,734.41

(1) It has been determined that the depreciation allowable on taxicabs is in the amount of \$2,102.68 rather than \$5,137.61 as claimed and the net income of the partnership has been increased accordingly in the amount of \$3,034.93.

(2) On the basis of the facts and for the reasons stated heretofore, it has been determined that the sum of \$4,986.38 charged to the partnership operations for the year 1946 as compensation to Charles W. Keffer and C. H. Luton, was capital in nature and not deductible in computing partnership income.

(c) It has been determined that your taxable net capital gains for the calendar year 1946 were in the amount of \$7,023.09 rather than \$7,491.15 as reported in your return. Your net income has therefore been decreased by the amount of \$468.06, computed as follows:

(1) Yellow Cab Co. of Portland.....	\$210.05
(2) Yellow Cab Co. of Seattle.....	(778.11)
(3) Mathematical error	100.00
<hr/>	
Total	(\$468.06)

(1) It has been determined that your distributive share of long-term capital gains from the partnership Yellow Cab Company of Portland, Oregon, was in the amount of \$287.50 rather than \$77.45 as reported in your return and your reported capital gain from such partnership has therefore been increased by the amount of \$210.05.

(2) In your return filed for the calendar year 1946, you reported a net loss of \$37.70 as your distributive share of the capital losses of the partnership Yellow Cab Co. of Seattle. It has been determined that your distributive share of capital losses from such partnership was in the amount of \$815.81 and your reported capital gain has therefore been decreased by the amount of \$778.11.

(3) On Schedule "D" of your return filed for the calendar year 1946, you reported a net short-term capital loss in the amount of \$2,383.30. The correct sum of such loss as reported was in the amount of \$2,283.30. Your reported net income has therefore been decreased by the amount of \$100.00.

(d) Since this office holds that your wife, Dora F. Royce is not a valid partner of Yellow Cab Co. of Portland and that your wife, Dora F. Royce and your daughter, Eunice M. Royce, are not valid partners of the Yellow Cab Company of Seattle, the distributive share of partnership contributions allocated to them, totaling \$171.30, has been allowed as a deduction to you.

(e) You failed to claim as a deduction in your 1946 return, interest in the amount of \$288.20 paid in 1946 on your 1945 income tax liability. An additional deduction of \$288.20 has therefore been allowed.

Computation of Income Tax

Net income as adjusted.....	\$286,331.01
Loss: Excess of net long-term capital gain over net short-term capital loss.....	7,023.09
Ordinary net income.....	\$279,307.92
Less: Exemptions	1,500.00
Balance subject to tentative tax.....	\$277,807.92
Tentative tax	227,625.21
Less: 5% of tentative tax.....	11,381.26
Partial tax	\$216,243.95
Plus (50% of \$7,023.09).....	3,511.55
Income tax liability.....	\$219,755.50
Income tax liability disclosed by return, Account No. 3014034.....	76,040.67
Deficiency in income tax.....	\$143,714.83

Taxable Year Ended December 31, 1947

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$ 68,218.74
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Unallowable deductions and additional income:

(a) Rental income	\$11,527.12	
(b) Partnership income	99,757.32	
(c) Capital gains	8,678.23	
(d) Other income	22,000.00	\$141,962.67

Total	\$210,181.41
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Non-taxable income and additional deductions:

(e) Salary	300.00	
(f) Abandonment loss	1,899.50	2,199.50

Net income adjusted.....	\$207,981.91
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Explanation of Adjustments

(a) On the basis of the facts and for the reasons stated above, it has been determined that as a result of the rental payments made during the year by Burnside Realty, Inc., the marital community realized rental income not reported, in the amount of \$15,440.00, of which amount the sum of \$3,912.88 is taxable to your wife, Dora F. Royce, and \$11,527.12 is taxable to you.

(b) In your return for the calendar year 1947, you reported the sum of \$54,613.13 as your distributive share of the income of certain partnerships in which you were interested. The following tabulation shows the names and addresses of such partnerships, your distributive share of incomes reported, the incomes as determined by this office and the increase or decrease.

Name of Partnership	Year Ended	Income Reported	Income Adjusted	Increase or (Decrease)
Yellow Cab Company				
Portland, Ore.	12/31/47	\$25,673.03	\$ 62,678.02	\$ 37,004.99
Royce Brothers				
Portland, Ore.	12/31/47	3,376.55	4,154.20	777.65
East Side Buses				
Portland, Ore.	12/31/47	(8,377.67)	(11,170.53)	(2,792.86)
Deluxe Attractions				
Portland, Ore.	12/31/47	(7,778.82)	(10,371.76)	(2,592.94)
Yellow Cab Company				
Seattle, Wash.	4/30/47	17,739.40	89,790.87	72,051.47
Gray Line Motor Tours				
Seattle, Wash.	7/31/47	21,779.73	29,039.64	7,259.91
Queen City Garage				
Seattle, Wash.	8/31/47	2,200.91	3,043.23	842.32
Totals		\$54,613.13	\$167,163.67	\$112,550.54

Less: Amount taxable as community income of your wife as computed below

\$ 12,793.22

Corrected partnership income \$154,370.45
Reported 54,613.13

Increase \$ 99,757.32

Allocation of Community Income

Yellow Cab Co., Portland....	\$62,678.02
Royce Brothers	4,154.20
East Side Buses.....	(11,170.53)
Deluxe Attractions	(10,371.76)
	<hr/>
	\$45,289.93x $\frac{1}{2}$ (185/365)—\$11,477.36
Gray Line Motor Tours.....	29,039.64x $\frac{1}{2}$ (27/365)—\$ 1,074.07
Queen City Garage.....	3,043.23x $\frac{1}{2}$ (58/365)—\$ 241.79
	<hr/>
Partnership income distributable to wife.....	\$12,793.22

The adjustments of your income attributable to the revision of the partnership income of Yellow Cab Company of Portland are shown below:

Yellow Cab Company of Portland

Ordinary net income as reported in partnership return \$ 95,297.06

Unallowable deductions and additional income:

(1) Depreciation	\$9,750.67	
(2) Cost of partnership interest.....	2,908.60	
(3) Accrued taxes and licenses.....	9,899.71	
(4) Repairs	7,500.00	30,058.98

Ordinary net income adjusted..... \$125,356.04

Allocation: 50% to B. Royce 62,678.02

50% to Ezra Royce 62,678.02

Reported 25,673.03

Increase \$ 37,004.99

(1) The depreciation allowable on taxicabs has been determined to be in the amount of \$20,615.82 rather than \$30,366.49 as claimed in the partnership return filed by the Yellow Cab Company of Portland and the ordinary net income of the partnership has therefore been increased by the amount of \$9,750.67.

(2) On the basis of the facts and for the reasons stated heretofore, it has been determined that the sum of \$2,908.60, charged to the partnership operations for the year 1947 as compensation to Charles W. Keffer and G. H. Luton was capital in nature and not deductible in computing partnership income.

(3) It has been determined that the accrued City 2% Gross Revenue Tax in the amount of \$9,899.71 claimed as a deduction in the return filed for the calendar year 1947 was being contested by the partnership and that the deduction is, therefore, unallowable.

(4) The deduction claimed in the partnership return filed for the calendar year 1947 as incurred in preparing used cabs for sale has been determined to be capital in nature to the extent of \$7,500.00, and not deductible as an ordinary and necessary business expense.

(c) It has been determined that your taxable net capital gain for the calendar year 1947 is in the amount of \$20,122.81 rather than \$11,444.58 as reported in your return and your net income has accordingly been increased by the amount of \$8,678.23 computed as follows:

	Reported	Corrected
Yellow Cab Company, Seattle.....	\$ 2,680.05	\$ 7,943.89
Yellow Cab Company, Portland.....	6,388.73	10,448.65
Gray Line Motor Tours.....	695.77	695.77
East Side Buses.....	338.96	338.96
100 shares Hart Shaffner & Marx.....	450.00	250.00
100 shares 20th Century Fox.....	807.07	403.54
U. S. & Foreign Securities dividend.....	84.00	42.00
	<hr/>	<hr/>
Totals	\$11,444.58	\$20,122.81
Reported		11,444.58
		<hr/>
Increase		\$ 8,678.23

It has been determined that the Yellow Cab Company of Portland understated its reported sales of used taxicabs for the year 1947 in the amount of \$15,000.00. The reported income of the partnership has accordingly been increased by \$15,000.00 and is reflected in the amount of \$10,448.65 shown above as your corrected distributive share of capital gains from such partnership.

(d) The records of this office show that during the

calendar year 1947, you received 440,000 shares of the common stock of Alder Gold-Copper Company having a fair market value of \$.10 per share as compensation for services rendered. In your return for the calendar year 1947, you reported no income from this source. It is held that the receipt of such stock constitutes taxable income to the marital community to the extent of its fair market value and your reported net income for the calendar year 1947 is therefore increased by one-half of such income, or \$22,000.00.

(e) It has been determined that \$300.00 of the salary of \$700.00 reported in your return for the calendar year 1947 as received from the Blue Line Transportation Co. is taxable to your wife, Dora F. Royce, under the provisions of the Community Property Law of Oregon. Your reported net income is accordingly decreased by the amount of \$300.00.

(f) It has been determined that the expenditures incurred by you in the amount of \$1,899.50 in connection with purchasing timber in Panama is allowable as an abandonment loss in computing your taxable income for the calendar year 1947.

Computation of Income Tax

Net income as adjusted.....	\$207,981.91
Less: Excess of net long-term capital gain over net short-term capital loss.....	20,122.81
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Ordinary net income.....	\$187,859.10
Less: Exemptions (3x\$500.00).....	1,500.00
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Balance subject to tentative tax.....	\$186,359.10
Tentative tax	144,543.19
Less: 5% of tentative tax.....	7,227.16
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Computation of Income Tax—(Continued)

Partial tax	\$137,316.03
Plus: (50% of \$20,122.81).....	10,061.41
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Income tax liability.....	\$147,377.44
Income tax liability disclosed by return, Account No. 3008951.....	35,116.31
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Deficiency in income tax.....	\$112,261.13
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Penalty, Sec. 294(d) (2), Internal Revenue Code	
Income tax liability as adjusted.....	\$147,377.44
Less: Withholding tax	\$ 11.20
Paid on estimated declaration.....	30,500.00 30,511.20
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Difference	\$116,866.24
Penalty (6% of \$116,866.24).....	\$ 7,011.97
Penalty Sec. 293(b) I.R.C. (50% of \$112,261.13).....	\$ 56,130.57

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51527.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.

2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegations contained in paragraph III of the petition.

4. Denies that he erred in his determination of

the deficiencies in income tax and penalties as shown in the notice of deficiency from which the petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5.(a) and (b) Admits the allegations contained in paragraph V(a) and (b) of the petition.

(c) Admits the allegations contained in the first sentence of paragraph V(c) of the petition. Denies the remaining allegations contained in paragraph V(c) of the petition.

(d) and (e). Admits the allegations contained in paragraph V(d) and (e) of the petition.

(f) and (g). For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(f) and (g) of the petition.

(h), (i) and (j). Admits the allegations contained in paragraph V(h), (i) and (j) of the petition.

(k). Admits the allegations contained in the first sentence of paragraph V(k) of the petition. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph V(k) of the petition.

(l). Denies the allegations contained in paragraph V(l) of the petition.

(m) and (n). For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the

allegations contained in paragraph V(m) and (n) of the petition.

(o), (p) and (q). Denies the allegations contained in paragraph V(o), (p) and (q) of the petition.

(r). Admits that on or about November 28, 1942, petitioner and B. Royce purchased the partnership interests of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland. Denies the remaining allegations contained in paragraph V(r) of the petition.

(s). Denies the allegations contained in paragraph V(s) of the petition.

(t). For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(t) of the petition.

(u). Denies the allegations contained in paragraph V(u) of the petition.

(v). Admits the allegations contained in the first two sentences of paragraph V(v) of the petition. Denies the remaining allegations contained in paragraph V(v) of the petition.

(w). Denies the allegations contained in paragraph V(w) of the petition. Alleges that the nature of the transaction, including the acquisition, payment and disposition of the remaining 350 shares of Oregon Motor Stages stock was as explained on pages 9 and 10 of Exhibit A attached to the petition on file in this proceeding.

(x). Denies the allegations contained in paragraph V(x) of the petition.

(y). Admits that Oregon Motor Stages paid interest to the American Business Credit Corporation and attorney's fees in the respective amounts of \$8,054.80 and \$2,135.41. Denies the remaining allegations contained in paragraph V(y) of the petition.

(z). Admits the allegations contained in paragraph V(z) of the petition.

(aa) and (bb). Denies the allegations contained in paragraph V(aa) and (bb) of the petition.

(cc). Admits that during the calendar year 1947 the city of Portland assessed a city 2% gross revenue tax on the partnership known as the Yellow Cab Company of Portland in the amount of \$9,-899.71, and that said sum was claimed by the partnership as a deduction on its return for that year. Denies the remaining allegations contained in paragraph V(cc) of the petition.

(dd). Admits that respondent has disallowed \$7,500.00 of the expenses incurred by Yellow Cab Company of Portland, a partnership, in preparing cabs for sale, which amount was claimed by the partnership as a deduction for the calendar year 1947. Denies the remaining allegations contained in paragraph V(dd) of the petition.

(ee), (ff) and (gg). Denies the allegations contained in paragraph V(ee), (ff) and (gg) of the petition.

(hh) and (ii). For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies

the allegations contained in paragraph V(hh) and (ii) of the petition.

(jj). Denies the allegations contained in paragraph V(jj) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

7. Further answering the petition, respondent alleges as follows:

(a). That during the taxable year 1947 petitioner was engaged in numerous business and other income producing activities in the city of Portland, Oregon, and other places; that the petitioner was engaged in the taxi cab business in Portland, Oregon; that this business was conducted and carried on as a partnership in 1947 under the name of Yellow Cab Company of Portland, and that petitioner was associated with his brother, B. Royce, in the operation thereof; that the petitioner was also a stockholder and officer of Oregon Motor Stages, Inc., a corporation engaged in the business of bus transportation in the state of Oregon; and that he further participated, as an individual proprietor, partner and/or joint venture in various other businesses including real estate, gold mining and the operation of a dance hall, all as more fully stated in the notice of deficiency from which the appeal is taken.

(b). That the petitioner and the various business ventures with which he was associated failed and/or refused to keep or maintain adequate books

of account or other accounting records in respect of the aforesaid business and/or income producing activities from which his gross income and net income for the taxable year involved in this proceeding might or could be determined.

(c). That the gross receipts of Yellow Cab Company of Portland, a partnership, and of the other business ventures in which petitioner had an interest, as aforesaid, were understated in substantial amounts and that during the taxable year the petitioner derived and/or received large amounts of income which were omitted from the income tax return as filed by him for said year.

8. That on March 15, 1948, petitioner filed a separate individual income tax return for the taxable year 1947, disclosing thereon a net income of \$68,218.74, although petitioner then and there knew that he had derived additional taxable income from Yellow Cab Company of Portland, a partnership, and the other business ventures with which petitioner was associated, as aforesaid, for said year in the amount of \$119,640.36, all of which was unreported income omitted from the return filed by him for the taxable year, and although petitioner then and there knew that his true net income for said year was not less than \$187,859.10, all as more fully stated on pages 17 to 21, inclusive, of the notice of deficiency from which this appeal is taken.

9. In further support and explanation of his allegations, as aforesaid, respondent alleges as follows:

(a). That the income derived and/or received

by petitioner during the taxable year in the amounts shown in paragraph 8, above, and the amount of income not reported by petitioner, was computed from information and data assembled from an examination of the books and records of petitioner and the business ventures with which he was associated, and from other sources.

(b). That for the taxable year 1947 petitioner failed to report income in the amount of \$4,059.92, as shown on page 20 of the notice of deficiency from which the appeal is taken, which amount of omitted income represented petitioner's distributive share of additional and unreported capital gains of the Yellow Cab Company of Portland, a partnership, as follows:

Reported	Corrected
\$6,388.73	\$10,448.65

That this unreported gain in the taxable year 1947 was attributable to petitioner's understatement of the sales of used taxi cabs and other assets reported by said partnership in the amount of \$15,-000.00, determined as follows:

Sales price (reported in Schedule

(c), Form 1065)\$50,254.00

Add: Amount of understatement ... 15,000.00

Sales price, corrected\$65,254.00

Cost basis, adjusted 23,459.38

Capital gain\$41,794.62

Gain taken into account 20,897.31

Petitioner's share of gain:\$10,448.65

(c). That among the items of income received by petitioner during the taxable year 1947, which were omitted from the return filed by him for said year, are the following amounts aggregating \$2,195.00, representing part of the proceeds from the sale of used taxi cabs belonging to Yellow Cab Company of Portland, a partnership, which amounts were diverted to the personal use of the petitioner, said sales further being identified as Plymouth cars 1941 and 1942 models sold in Portland, Oregon, in 1947 through the agency of one J. E. Hamilton, used car dealer, pursuant to arrangement made by petitioner:

Date of Sale	Cab No.	Sales Proceeds Remitted to Petitioner	Amount Reported by Yellow Cab	Amount Retained by Petitioner
6-28-47	77	\$ 795	\$ 700	\$ 95
7-14-47	16	800	695	105
7-14-47	67	800	700	100
7-29-47	37	800	600	200
8- 6-47	56	700	625	75
8-12-47	96	850	650	200
8-26-47	48	845	665	180
9-10-47	95	800	690	110
9-16-47	17	895	690	205
9-13-47	94	895	690	205
9-27-47	22	895	650	245
9-30-47	64	895	695	200
10-30-47	69	895	695	200
12- 4-47	50	775	700	75
Totals.....		\$11,640	\$9,445	\$2,195

(d). That among the items of income received by the petitioner during the taxable year 1947 which were omitted from the return filed by him

for said year, are the following amounts aggregating \$1,830, representing part of the proceeds from the sale of used taxi cabs belonging to Yellow Cab Company of Portland, a partnership, which amounts were appropriated by the petitioner to his own personal use:

Date of Sale	Cab No.	Sales Price Per Purchaser	Sales Proceeds Reported by Yellow Cab	Amount Retained by Petitioner
6-26-47	23	\$ 900	\$ 700	\$ 200
9- 4-47	34	900	625	275
8-23-47	54	700	625	75
8-22-47	61	725	650	75
8-22-47	75	725	650	75
8-29-47	59	850	665	185
8-29-47	73	850	665	185
8-29-47	76	850	690	160
8-22-47	62	750	650	100
8-22-47	86	750	650	100
7-31-47	18	800	700	100
7-31-47	42	800	700	100
7-31-47	83	800	700	100
7-31-47	85	800	700	100
Totals.....		\$11,200	\$9,370	\$1,830

10. That by reason of the premises, the return as filed by the petitioner for the taxable year 1947 is a false and fraudulent return filed with intent to evade tax, and for the purpose of defrauding and deceiving the respondent and the United States, and the deficiency in income tax involved in this proceeding for the taxable year is due in whole or in part to fraud with intent to evade tax.

Wherefore, it is prayed that the petitioner's appeal be denied, and further, that the Court redetermine and hold:

(1) That there is a deficiency in income tax for the taxable year 1947 in the amount as determined by the Commissioner for said taxable year and as shown by the notice of deficiency, as aforesaid;

(2) That the return as filed by the petitioner for the taxable year 1947 is a false and fraudulent return filed with intent to evade tax;

(3) That the deficiency in income tax for the taxable year 1947 is due in whole or in part to fraud with intent to evade tax; and

(4) That there is due and owing by the petitioner for said taxable year 1947 the penalties appropriate thereto, as determined by respondent and as shown by the notice of deficiency, as aforesaid.

/s/ DANIEL A. TAYLOR,

Chief Counsel,

Internal Revenue Service.

Of Counsel: Wilford H. Payne, Associate Appellate Counsel, John D. Picco, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 23, 1954.

[Title of Tax Court and Docket No. 51527.]

REPLY

The Petitioner, by his attorney, R. T. Jacobs, for reply to the facts set forth in the Answer heretofore filed in this proceeding, admits and denies as follows:

7. (a) Admits that during the taxable year 1947,

petitioner was engaged in several business activities; that the Petitioner was engaged as a partner in the taxi-cab business in Portland, Oregon, under the name of Yellow Cab Company of Portland, and that Petitioner was associated with his brother, B. Royce, Isabelle Royce and Dora F. Royce in the operation thereof; that the petitioner was also a stockholder and officer of Oregon Motor Stages, Inc., a corporation engaged in the business of bus transportation in the state of Oregon; and that he further participated in various other business enterprises; denies each and all of the other allegations contained in paragraph 7 (a).

7. (b). Denies each and all of the allegations contained in paragraph 7 (b).

7. (c). Denies each and all of the allegations contained in paragraph 7 (c).

8. Admits that on or about March 15, 1948, petitioner filed an individual income tax return for the taxable year 1947 disclosing thereon a net income of \$68,218.74; denies each and all of the other allegations contained in paragraph 8; specifically denies that the petitioner derived additional taxable income in the year 1947 in the amount of \$119,640.36, or any other amount.

9. (a). Denies each and all of the allegations contained in paragraph 9 (a).

9. (b). Denies each and all of the allegations contained in paragraph 9 (b); specifically denies that petitioner had unreported income in the amount of \$4,059.92, or any other amount, from the sale of used taxi-cabs or from any other source.

9. (c). Denies each and all of the allegations contained in paragraph 9 (c); specifically denies that the petitioner had unreported income in the year 1947 in the amount of \$2,195.00, or any other amount, from the sale of used taxi-cabs or from any other source.

9. (d). Denies each and all of the allegations contained in paragraph 9 (d); specifically denies that the petitioner had unreported income in the year 1947 in the amount of \$1,830.00 or any other amount from the sale of used taxi-cabs, or from any other source.

10. Denies each and every allegation contained in paragraph 10.

Wherefore, it is prayed that the prayer for affirmative relief set forth in the Respondent's Answer be denied and the relief requested in the Petition be granted.

/s/ R. T. JACOB,

Of Counsel:

Jacob, Jones and Brown.

[Endorsed]: T.C.U.S. Filed May 21, 1954.

[Title of Tax Court and Docket No. 51528.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau Symbols ARC-Ap: SF Port

VEV:90D) dated the 28th day of September, 1953, and as a basis of his proceeding alleges as follows:

I.

The petitioner is an individual residing in Vancouver, Washington. The returns for the period involved were filed with the Collector of Internal Revenue in Tacoma, Washington.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on September 28, 1953.

III.

The Commissioner determined a deficiency in income tax for the years and in the amounts as follows:

Year	Deficiency	Sec. 294(d)(2) Penalty
1945	\$20,399.28	\$2,005.84
1947	8,421.34	
	<hr/>	<hr/>
Totals	\$28,820.62	\$2,005.84

of which the total amount is in controversy.

IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

1. The respondent erred in including as petitioner's share of community income in 1945, the sum of \$21,875.00, or any other amount, as income to petitioner from the Oregon Motor Stages stock transaction.

2. The respondent erred in determining additional community income to petitioner in 1945 in the amount of \$519.05, or any other amount, as additional income from the Oregon Motor Stages stock transaction.

3. The respondent erred in increasing petitioner's community income in the year 1945 in the amount of \$2,951.55, in the year 1946 in the amount of \$2,201.76, and in the year 1947 in the amount of \$1,140.73, or any other amounts, from the sales of livestock made by petitioner in those years.

4. The respondent erred in reducing petitioner's capital loss carryover to the year 1945 by the amount of \$1,718.97, or any other amount.

5. The respondent erred in determining that the Yellow Cab Company of Portland, a partnership, had claimed excessive depreciation in the amount of \$10,213.38 for the year 1945, in the amount of \$3,034.93 for the year 1946 and in the amount of \$9,750.67 for the year 1947, or any other amounts.

6. The respondent erred in determining that payments made by the Yellow Cab Company of Portland, a partnership, to Charles W. Keffer and C. H. Luton in the amount of \$5,349.32 for the year 1945, in the amount of \$4,986.38 for the year 1946 and in the amount of \$2,908.60 for the year 1947, or any other amounts, are not deductible in computing said partnership income for said years.

7. The respondent erred in determining that petitioner received taxable income in the amount of \$932.06 in the year 1946 and in the amount of \$932.06 for the year 1947, or any other amounts, on

the purchase of a lease by petitioner from L. W. Hendrickson.

8. The respondent erred in determining that the sum of \$9,899.71, or any other amount, accrued as a city revenue tax in the year 1947 by the Yellow Cab Company of Portland, a partnership, was unallowable as a deduction.

9. The respondent erred in determining that the Yellow Cab Company of Portland, a partnership, expended the sum of \$7,500.00 in preparing used cabs for sale and in disallowing said amount or any part thereof as a deduction to the said partnership for the year 1947.

10. The respondent erred in determining that the Yellow Cab Company of Portland, a partnership, understated its reported sale of used taxi-cabs for the year 1947 in the amount of \$15,000.00, or any other amount.

11. The respondent erred in asserting a penalty in any amount under Sec. 294(d)(2), Internal Revenue Code, or any other section.

V.

The facts upon which petitioner relies as a basis for this appeal are as follows:

(a) Petitioner is an individual residing in Vancouver, Washington, and was during all of the years involved herein, married to Isabelle H. Royce, and reported his income for Federal Income Tax purposes on the basis of cash receipts and disbursements and calendar year.

(b) During the year 1945, petitioner and a num-

ber of associates entered into negotiations with the then stockholders of Oregon Motor Stages for the acquisition of the outstanding stock of said corporation. There were outstanding at that time 750 shares of stock of said company and the price upon which negotiations were based was \$1,000.00 per share. Petitioner, Albert L. Schneider, E. Royce, F. C. Niederkrome and R. T. Jacob, began preparations for the acquisition of said stock, but Mr. L. R. Bentson of Vancouver, B. C., who is a relative of petitioner and E. Royce, informed the group that he desired to acquire a portion of the stock and agreed to and did purchase 350 shares of said stock.

(c) In the acquisition of his stock, Mr. Bentson advised the group that his funds were in Canada and were blocked, and it would be necessary for him to make arrangements to finance his purchase. Accordingly, a loan was negotiated on his behalf with the Portland Branch of the American Business Credit Corporation. In the transaction, petitioner loaned his stock as an accommodation to be pledged with Bentson's stock as security for said loan, but petitioner did not participate in the negotiation of said loan and had no obligation whatsoever for its repayment.

(d) After the conclusion of World War II in August, 1945, Mr. Bentson became apprehensive that the earnings of the corporation would be drastically curtailed and that the investment would not prove as profitable in the matter of liquidating his obligation as he had anticipated at the time of its

purchase. Mr. Bentson then made an offer to the corporation to surrender his 350 shares of stock upon the corporation paying the interest on his obligation and liquidating the loan from the said Portland Branch of the American Business Credit Corporation. Upon the surrender of his shares of stock, Oregon Motor Stages issued to Mr. Bentson a check for the sum of \$350,000.00, which said check the said Mr. Bentson delivered to the American Business Credit Corporation in payment of his said loan.

(e) The petitioner did not receive any part of said payment from Oregon Motor Stages, either directly, indirectly or constructively nor did he receive any benefit directly or indirectly from the payment of the said sum to the said Mr. Bentson. The value of petitioner's stock in said Oregon Motor Stages was not enhanced in value by the surrender of the stock of the said Bentson, but the value thereof was, in fact, depreciated by the surrender of said stock by the said Bentson and the distribution of the corporation's cash to him, and the company's operations were curtailed thereby.

(f) The cancellation or redemption or purchase by Oregon Motor Stages was of all the stock of a particular stockholder, Mr. Bentson, and he thereafter ceased to be interested in the affairs of the corporation and neither Mr. Bentson nor any other member of the said group retained any beneficial or other interest in said stock thereafter. Neither Mr. Bentson nor any other member of the said group realized any economic, taxable or other gain of any

character from the transaction. There was no pro-rata or any other type of distribution from the corporation to the stockholders.

(g) The facts as set forth in the immediately preceding paragraphs above apply with equal force and effect to the item of \$519.05, included by the respondent in petitioner's income for the year 1945 as an additional distribution from the Oregon Motor Stages stock transaction to the petitioner.

(h) During each of the years herein involved, the petitioner operated a farm in the State of Washington. The principal function of the farm operation was for the production of milk for bottle distribution and the operation of the farm also included the production of purebred Guernsey stock, which latter production was primarily for the purpose of producing milk cows to support the sale and distribution of milk.

(i) Before the preparation of his tax returns for each of the years in question, petitioner had his accountant prepare a list of the livestock sold during the year. This list indicated each individual animal sold, the date it was acquired and whether or not it was an animal intended for petitioner's herd or raised for sale in the ordinary course of business. All animals culled from the general herd as not being desirable animals to be included therein were treated as animals held for sale in the ordinary course of business and the profit realized therefrom was treated on all of petitioner's returns as ordinary income.

(j) The animals retained by petitioner as part

of his breeding herd constituted property used in the trade or business of the petitioner, and petitioner treated the gain or loss on the sale of any of these animals during the years herein involved, and where the animals had been held for more than 6 months as being capital gain or capital loss transactions. It was the practice of the petitioner to hold his animals for substantially their full period of usefulness prior to selling the same.

(k) The petitioner properly carried over a capital loss to the year 1945 in the amount of \$1,718.97.

(l) For the years 1945, 1946 and 1947 the respondent has determined that the Yellow Cab Company of Portland, a partnership, claimed excessive depreciation in the amounts of \$10,213.38, \$3,034.93 and \$9,750.67 respectively.

(m) The Yellow Cab Company of Portland has, for a number of years, followed the consistent practice of using a straight line method of depreciation and completely writing off all of its taxi-cabs over a four year period. The depreciation claimed by the Yellow Cab Company of Portland for said years constituted a reasonable allowance for exhaustion, wear and tear (including a reasonable allowance for obsolescence), under normal circumstances.

(n) On or about the 28th day of November, 1942, petitioner and E. Royce purchased the partnership interests of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland, a partnership, for a cash consideration. At the same time, the partnership entered into a profit sharing agreement with the said Charles Keffer and C. H. Luton

whereby each would be entitled to a certain percentage of the partnership profits thereafter as long as it was mutually agreeable that the said individuals continue in the employment of the partnership. Percentage of profit payments made under these agreements were properly deducted by the partnership in computing its net income for the years 1945, 1946 and 1947.

(o) On or about December 6, 1945, petitioner, B. Royce, in consideration of the payment by him of \$18,000.00, acquired an assignment of the balance due L. W. Hendrickson under his lease of property to Burnside Realty, Inc., and of the balance to be due under the option to purchase said property given to E. Royce. The assignment recited that 34 payments of \$553.03 per month were due from Burnside Realty, Inc., and the sum of \$6,555.65 "on the date said option is closed." Said option could not be closed until the year 1949, if at all.

(p) Petitioner received payments from Burnside Realty, Inc., under said assignment of \$6,636.36 in the year 1946 and the same amount in the year 1947. Petitioner did not report any gain on the transaction until he had recovered his investment of \$18,000.00, which did not occur until 1948. Petitioner could not determine until the year 1948 whether or not the rent payments would be fully made and the option would be exercised and thus whether any gain would be realized. The value of petitioner's contract rights depended on uncertain future payments.

(q) During the calendar year 1947, the City of

Portland assessed a city 2% gross revenue tax in the amount of \$9,899.71 against the Yellow Cab Company of Portland, a partnership. This said sum was accrued on the books of the Yellow Cab Company of Portland in the year 1947 and was claimed by said partnership as a deduction on its return for the said year, in accordance with the method of accounting regularly employed in keeping its books of account.

(r) The respondent has disallowed \$7,500.00 of the repair expenses claimed by the Yellow Cab Company of Portland, a partnership, as a deduction for the calendar year 1947, said disallowance being based upon the theory that the said company made capital expenditures of \$100.00 per cab sold in that year in preparing and painting each cab for sale.

(s) The Yellow Cab Company of Portland, a partnership, maintains its own garage and staff of mechanics and makes any and all repairs necessary to its cabs therein. The repair and painting expenses incurred by the said company represents repairs required in the ordinary course of business, and were charged to the account of repairs and maintenance in accordance with the method of accounting regularly employed and established many years before.

(t) All proceeds of sales of cabs made by the Yellow Cab Company of Portland, a partnership, during the calendar year 1947 are correctly recorded on the books of the said company and were properly reported on the tax return of the said company for the calendar year 1947.

(u) For the year 1945, petitioner reported on his estimated tax the full amount of tax estimated to be due and owing for said years and the penalty proposed for said years is without foundation.

Wherefore, petitioner prays that the Court hear this proceeding and determine that there is no deficiency in income taxes for any of the years 1945 and 1947 and that petitioner is not subject to any penalties determined by the respondent or any part thereof.

/s/ R. T. JACOB.

Of Counsel:

Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

Regional
1112 Cascade Building
Portland 4, Oregon

ARC-Ap:SF

Port:VEV:90D

Sep. 28, 1953

Mr. B. Royce
306 West 21st Street
Vancouver, Washington

Dear Mr. Royce:

You are advised that a determination of your income tax liabilities for the taxable years ended December 31, 1945, and 1947, discloses deficiencies in income tax in the total amount of \$28,820.62 and a penalty computed in accordance with the provisions of section 294(d) of the Internal Revenue Code for

the taxable year 1945 in the amount of \$2,005.84, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner,

/s/ By A. N. Williams,
Associate Chief, Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form 870

VEVlene 1pt

STATEMENT

ARC-AP:SF

Port:VEV:90D

B. Royce

306 West 21st Street

Vancouver, Washington

Income tax liability for the taxable years ended
December 31, 1945, 1946 and 1947.

Year	Deficiency	Overassessment	Section 294(d) (2)
			Penalty
1945	\$20,399.28		\$2,005.84
1946		\$1,440.66	
1947	8,421.34		
Totals	\$28,820.62	\$1,440.66	\$2,005.84

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 20, 1951, and to your protest dated August 17, 1951.

The 6% penalty for substantial underestimate of estimated tax has been asserted for the taxable year ended December 31, 1945, in accordance with the provisions of section 294(d)(2) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Robert T.

Jacob, 917 Public Service Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

The overassessment shown herein should not be regarded as finally determined. When final determination has been made, the overassessment, to the extent of the amount allowable, will be made the subject of a certificate of overassessment, which will reach you in due course through the office of the Director of Internal Revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you have fully protected yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the Director of Internal Revenue for your district a timely claim for refund on Form 843.

Taxable Year Ended December 31, 1945

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$115,515.61	
Unallowable deductions and additional income:		
(a) Dividends (Oregon Motor Stages) ..	\$21,875.00	
(b) Additional distribution		
(Oregon Motor Stages)	519.05	
(c) Farm loss	2,951.55	
(d) Capital gains	232.24	25,577.84
		<hr/>
Total		\$141,093.45
Non-taxable income and additional deductions:		
(e) Partnership income	\$ 2,831.23	
(f) Interest expense	467.46	3,298.69
		<hr/>
Net income adjusted		\$137,794.76
		<hr/> <hr/>

Explanation of Adjustments

(a) The records of this office show that prior to July 2, 1945, you, your brother E. Royce, Robert T. Jacob, Fred C. Niederkrome, and A. L. Schneider, negotiated for the purchase of the capital stock of Oregon Motor Stages, Portland, Oregon, an Oregon corporation engaged in the business of bus transportation. The outstanding stock of that corporation then consisted of 750 common shares, par value \$100.00 per share.

As a result of the negotiations referred to above, on or about July 2, 1945, you and your associates purchased shares of Oregon Motor Stages in the number and at the cost shown below:

	Shares	Cost
E. Royce	145	\$145,000.00
B. Royce	50	50,000.00
Robert T. Jacob.....	100	100,000.00
Fred C. Niederkrome.....	55	55,000.00
A. L. Schneider.....	50	50,000.00
	<hr/>	<hr/>
Total.....	400	\$400,000.00

In accordance with the plan adopted, the remaining 350 shares of Oregon Motor Stages stock were acquired in the name of your uncle, L. R. Bentson, 411 East 15th Street, North Vancouver, B. C., in consideration of payment of \$350,000.00 in cash. Such payment was made from the proceeds of a loan obtained by E. Royce acting for you and your above-named associates, through the Portland Branch of the American Business Credit Corporation, New York City, on a 90-day note which was signed by E. Royce and L. R. Bentson which was

collateralized by a deposit of the entire 750 shares of Oregon Motor Stages.

On or about September 6, 1945, pursuant to the plan adopted by you and your associates, as aforesaid, Oregon Motor Stages acquired the 350 shares of its own stock then standing in the name of L. R. Bentson and issued its check to him in the sum of \$350,000.00. This check was immediately endorsed and delivered to the American Business Credit Corporation in satisfaction of the 90-day note signed by E. Royce and L. R. Bentson.

It has been determined that it was not intended that L. R. Bentson should acquire, nor did he at any time acquire, any bona fide or actual beneficial interest in the stock of Oregon Motor Stages.

It has been further determined that the accumulated earnings and profits of Oregon Motor Stages available for distribution as dividends during the year 1945 were in excess of \$350,000.00.

This office holds that the transaction whereby Oregon Motor Stages acquired 350 shares of its capital stock, which were issued in the name of L. R. Bentson, for the sum of \$350,000.00 was consummated at such a time and in such a manner as to result in the realization of taxable income to the marital community in the amount of \$43,750.00, such sum being that portion of the total sum of \$350,000.00 which 50 shares of stock of Oregon Motor Stages owned by you bears to the total of 400 shares of such stock owned by you, E. Royce, Robert T. Jacob, Fred C. Niederkrome and A. L. Schneider. Your taxable income has therefore been

increased by \$21,875.00, such sum being your community share of the sum of \$43,750.00.

(b) It has been further determined that in connection with the transaction whereby Oregon Motor Stages acquired 350 shares of its stock in the manner stated above, that corporation paid interest to the American Business Credit Corporation and attorney fees in the respective total amounts of \$8,054.80 and \$2,135.41. With respect to these sums, this office holds that to the event of \$1,006.86 and \$31.25, respectively, the payment of interest and attorney fees was in satisfaction of your personal liability, incurred in connection with the transaction whereby you acquired the stock of the Oregon Motor Stages, and is income of the marital community. Your reported income has, therefore, been increased by \$519.05, being your community interest of the total of \$1,006.85 and \$31.25.

(c) In your income tax return filed for the calendar year 1945, you reported a net capital gain from the sale of livestock purchased and raised in the amount of \$5,910.59, of which \$2,955.30 was taken into account under the provisions of Section 117(b) of the Internal Revenue Code. One-half of such recognized gains or \$1,477.65 was reported in your return as income taxable to you and the balance of \$1,477.65 was reported as income in a separate return filed by your wife, Isabelle H. Royce, under Washington Community Property Law provisions. It has been determined that of such reported capital gains in the amount of \$5,910.59, the sum of \$5,903.10 was from sales of livestock held

for sale to customers in the ordinary course of your business and is therefore taxable as ordinary income rather than as a capital gain. Your reported ordinary community income has accordingly been increased by one-half the amount of \$5,903.10, or \$2,951.55.

(d) In your return filed for the calender year 1945, you reported a net capital gain from sales or exchanges of capital assets in the amount of \$1,574.54. It has been determined that you realized a net gain from such sales or exchanges in the amount of \$1,806.78, and your net income has accordingly been increased by the amount of \$232.24, computed as follows:

Net capital gain reported.....	\$1,574.54
Additional income from capital gains:	
(1) Capital loss carry-over.....	\$1,718.97
(2) Partnership capital gains.....	(10.96)
(3) Livestock sales	(1,475.77)
<hr/>	
Total increase	\$ 232.24
<hr/>	
Net capital gain as corrected.....	\$1,806.78

(1) In your return for the calender year 1945, you claimed a capital loss carryover in the amount of \$1,718.97. It has been determined that you have no allowable capital loss carryover to the year 1945 and your net capital gains have been increased accordingly.

(2) It has been determined that your community shares of capital gains from the partnership Yellow Cab Co., Portland, Oregon, is in the amount of \$141.25 rather than \$152.21 as reported in your

1945 return and your reported capital gains have accordingly been decreased by the amount of \$10.96.

(3) In your return for the calendar year 1945, you reported a net long-term capital gain from the sale or exchange of livestock purchased or raised in the amount of \$2,955.30, of which one-half or \$1,477.65 was included as taxable income to you under the State of Washington Community Property Law provisions. It has been determined that the correct amount of gains from the sale of livestock was in the amount of \$7.49, of which 50% or \$3.75 is recognized and that your community share thereof is in the amount of \$1.88. Your reported capital gains have therefore been decreased in the amount of \$1,475.77. (See Item (c) above.)

(e) In your return filed for the calendar year 1945, you reported the sum of \$129,073.54 as being your distributive share of the net incomes from partnerships. It has been determined that your distributive share of net incomes from partnerships is in the amount of \$126,242.31 and your net income has accordingly been decreased by the amount of \$2,831.23, computed as follows:

(1) Yellow Cab Company, Portland, Oregon.....	\$1,177.62
(2) Royce Brothers	1,653.61
Total	<u>\$2,831.23</u>

(1) In your return filed for the calendar year 1945, you reported the sum of \$70,381.28 as your distributive share of the ordinary partnership income reported in the return filed by the Yellow Cab Company, Portland, Oregon, for the calendar

year 1945. It has been determined that your correct distributive share of such partnership income is \$138,407.32, computed as follows:

Ordinary income reported in partnership return.....	\$261,251.95
Unallowable deductions and additional income:	
(A) Depreciation	10,213.38
(B) Cost of partnership interest.....	5,349.32
	<hr/>
Ordinary net income adjusted.....	\$276,814.65
Your distributive share.....	\$138,407.32

(A) It has been determined that the depreciation allowable as a deduction is in the amount of \$1,764.80 rather than \$11,978.18 as claimed and the net income of the partnership has been increased accordingly in the amount of \$10,213.38.

(B) The record shows that prior to August 1, 1942, Charles W. Keffer and C. H. Luton were the owners of .659% and .906% interest, respectively, in the partnership Yellow Cab Company of Portland. On or about that date, August 1, 1942, you and your brother, E. Royce, purchased the interests of these individuals under an agreement whereby inter alia, each of the vendors was to receive 1% of the partnership net profits for a period of five years.

During the year under review, payments to them were charged to partnership operation as compensation. This office holds that payments in 1945 totaling \$5,349.32 made by the partnership under the contract and in the manner referred to in the preceding paragraph were capital in nature and not deductible in computing partnership income.

Your distributive share of the partnership income of Yellow Cab Co., Portland, Oregon, has been determined to be income of the marital community. Your reported net income from such partnership has accordingly been decreased by the amount of \$1,177.62 computed as follows:

Your distributive share as shown above.....	\$138,407.32
Community share, one-half.....	69,203.66
Reported	70,381.28
<hr/>	
Decrease	\$ 1,177.62

(2) In your return for the calendar year 1945, you reported income from the partnership Royce Brothers in the amount of \$3,307.23. It has been determined that such income is income of the marital community and that only one-half thereof is taxable to you. Your reported net income from this source has accordingly been decreased by the amount of \$1,653.61.

(f) It has been determined that of the amount of \$1,006.85 held under item (b) above to be taxable income of the marital community, the sum of \$467.46 is allowable as a deduction for interest paid in computing your income for the year 1945.

Computation of Income Tax

Net income adjusted.....	\$137,794.76
Less: Excess of net long-term capital gain over net short-term capital loss.....	1,806.78
<hr/>	
Ordinary net income.....	\$135,987.98
Less: Normal tax exemption.....	500.00
<hr/>	
Balance subject to normal tax.....	\$135,487.98

Computation of Income Tax—(Continued)

Normal tax 3% of \$135,487.98	4,064.64
Ordinary net income.....	\$135,987.98
Less: Surtax exemptions.....	500.00
Balance subject to surtax.....	\$135,487.98
Surtax	\$ 98,904.30
Partial tax	\$102,968.94
Plus: 50% of \$1,806.78.....	903.39
Income tax liability.....	\$103,872.33
Income tax liability disclosed by return, Account No. 3015686 - Washington.....	83,473.05
Deficiency in income tax.....	\$ 20,399.28
Penalty, Sec. 294(d)(2), Internal Revenue Code	
Income tax liability as adjusted.....	\$103,872.33
Less: Withholding tax.....	None
Paid on Estimated Declaration.....	\$70,441.60 70,441.60
Difference	\$ 33,430.73
Penalty (6% of \$33,430.73).....	\$ 2,005.84

Taxable Year Ended December 31, 1946

Adjustments to Net Income

Net income as disclosed by return, Form 1040	\$110,026.70
Unallowable deductions and additional income:	
(a) Net gain from sale or exchange of property other than capital assets \$ 26.22	
	932.06 958.28
Total	\$110,984.98
Non-taxable income and additional deductions:	
(c) Partnership income	\$2,261.88
(d) Capital gains	676.95 2,938.83
Net income adjusted	\$108,046.15

Explanation of Adjustments

(a) It has been determined that of the long-

term capital gains or losses reported in your return, the net amount of \$26.22 constitutes ordinary income from the sale of other than capital assets and your net income has been increased accordingly by the sum of \$26.22, computed as follows:

(1) Gains from sale of livestock.....	\$2,201.76
(2) Losses from sale of livestock.....	(1,961.56)
(3) Yellow Cab Company of Seattle.....	(213.98)
	<hr/>
	\$ 26.22

(1) In your return filed for the calendar year 1946, you reported long-term capital gains of the marital community from the sale of livestock raised and purchased in the total amount of \$5,111.53, of which one-half was taxable to you as community income. It has been determined that of such sales, the sum of \$4,403.53 were sales of livestock held for sale in the ordinary course of business. Your gains from the sale of livestock, reported as sales of property other than capital assets, has accordingly been increased by one-half of \$4,403.53, or \$2,201.76.

(2) In your return filed for the calendar year 1946, you reported long-term capital losses of the marital community, from the sale of livestock purchased in the total amount of \$3,923.12 of which one-half was your community share. It has been determined that the loss of \$3,923.12 was from the sale of livestock held for sale to customers in the ordinary course of business. Your gains from the sale of livestock, reported as sales of property other than capital assets, has accordingly been decreased by one-half of \$3,923.12, or \$1,961.56.

(3) In your return you reported the sum of \$213.98 as your community portion of the net short-term capital loss of the partnership Yellow Cab Company of Seattle. It has been determined that such reported loss was from the sale of property other than capital assets and your reported income from the sale of other than capital assets has accordingly been decreased by the amount of \$213.98.

(b) It has been determined that during the year 1946, the marital community received payments totaling \$6,636.36 upon a contract purchased by you from L. W. Hendrickson and that your community share of the profits from such payments is in the amount of \$932.06 computed as follows:

Total proceeds	\$25,031.14	100.0000%
Cost		71,9104%
		<hr/>
Profit		28.0896%
Payments received in 1946.....		\$6,636.36
Profit realized in 1946—\$6,636.36x28.0896%		1,864.13
50% Community		932.07
Taxable to you.....		932.06

(c) It has been determined that the marital community received partnership income for the calendar year 1946 in the amount of \$253,002.14 and that your community share is \$126,501.07 rather than \$128,762.95 as reported. Your reported partnership income has accordingly been decreased by the amount of \$2,261.88, computed as follows:

	Corrected Income
Royce Brothers	\$ 5,989.42
Queen City Garage.....	3,014.96
The Gray Line Tours.....	12,598.66
Cloverhill Guernsey Farm.....	(8,817.50)

	Corrected Income
Necanicum Fur Farm.....	(2,082.98)
Yellow Cab Company of Seattle.....	116,565.17
Yellow Cab Company of Portland.....	125,734.41
<hr/>	
Total partnership income as corrected	\$253,002.14
Community share, one-half.....	126,501.07
Reported	128,762.95
Decrease	2,261.88

In the partnership return filed by the Yellow Cab Company of Portland for the calendar year 1946, the distributive share of the ordinary net income of the marital community was shown as being in the amount of \$121,723.76. It has now been determined that the distributive share of the marital community from such partnership is in the amount of \$125,734.41 computed as follows:

Ordinary net income as disclosed by return.....	\$243,447.51
Unallowable deductions and additional income:	
(A) Depreciation	\$3,034.93
(B) Cost of partnership interest.....	4,986.38 8,021.31
<hr/>	
Ordinary net income adjusted.....	\$251,468.82
Your distributive share.....	125,734.41

(A) It has been determined that the depreciation allowable on taxicabs is in the amount of \$2,102.68 rather than \$5,137.61 as claimed and the ordinary net income of the partnership has been increased accordingly in the amount of \$3,034.93.

(B) On the basis of the facts and for the reasons stated heretofore, it has been determined that the sum of \$4,986.38, charged to the partnership operations for the year 1946 as compensation to Charles W. Keffer and C. H. Luton was capital in

nature and not deductible in computing partnership income.

(d) In your return filed for the calendar year 1946, you reported the sum of \$3,835.84 as being your community share of capital gains. It has been determined that your correct share of the capital gains of the marital community is in the amount of \$3,158.89 and your net income has therefore been decreased by the amount of \$679.95, consisting of the following adjustments:

(1) Capital gains from sale of livestock.....	\$(1,100.89)
(2) Capital loss from sale of livestock.....	980.78
(3) Yellow Cab Company of Portland.....	(11.16)
(4) Yellow Cab Company of Seattle.....	(445.68)
(5) Mathematical error	(100.00)

Decrease \$(676.95)

(1) It has been determined that of the long-term capital gains from the sale of livestock reported in your return filed for the calendar year 1946, the amount of \$2,201.77 was from the sale of livestock held for sale to customers in the ordinary course of your business and is, therefore, ordinary income. Your reported capital gains are therefore decreased by the amount of 50% of such gains, or \$1,100.89.

(2) It has been determined that of the long-term capital losses from the sale of livestock reported in your return filed for the calendar year 1946, the amount of \$1,961.56 was from the sale of livestock held for sale to customers in the ordinary course of your business and is, therefore, an ordinary loss. Your reported capital gains are therefore increased by the amount of 50% of such losses, or \$980.78.

(3) It has been determined that your community share of the long-term capital gains reported in the partnership return of Yellow Cab Company of Portland is in the amount of \$143.75, rather than \$154.91 as reported in your return filed for the calendar year 1946. Your reported capital gains are therefore decreased by the amount of \$11.16.

(4) In your return filed for the calendar year 1946, you reported as your community share of the capital gains of the partnership Yellow Cab Company of Seattle, a net long-term capital gain of \$251.75 and a net short-term capital loss of \$213.98. It has been determined that the partnership realized a net long-term capital loss of \$3,199.25, of which your distributive community share is \$407.91. It has been further determined that the partnership realized no short-term capital gains or losses. Net capital gains have accordingly been decreased by the amount of \$445.68.

(5) In your returns filed for the calendar year 1946, you erroneously reported 50% of long-term capital losses in the amount of \$2,468.97 as being \$1,134.48 rather than \$1,234.48. Your reported capital gains are accordingly decreased by the amount of \$100.00.

Computation of Income Tax

Net income adjusted.....	\$108,046.15
Less: Excess of net long-term capital gain over net short-term capital loss.....	3,158.89
Ordinary net income.....	\$104,887.26
Less: Exemptions	500.00
Balance subject to tentative tax.....	\$104,387.26

Computation of Income Tax—(Continued)

Tentative tax	71,224.66
Less: 5% of tentative tax.....	3,561.23
Partial tax	\$ 67,663.43
Plus: 50% of \$3,158.90.....	1,579.45
Income tax liability.....	\$ 69,242.88
Income tax liability as disclosed by return, Account No. 3022247 - Washington.....	70,683.54
Overassessment in income tax.....	\$ 1,440.66

Taxable Year Ended December 31, 1947

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$76,468.68
Unallowable deductions and additional income:	
(a) Net gain from sale or exchange of property other than capital assets \$ 1,140.73	
(b) Partnership income	11,197.22
(c) Other income	932.06
Total	\$89,738.69
Non-taxable income and additional deductions:	
(d) Capital gains	3,169.45
Net income adjusted.....	\$86,569.24

Explanation of Adjustments

(a) In your income tax return filed for the calendar year 1947 you reported a net capital gain of \$2,281.47 from the sales of livestock purchased and raised of which \$1,140.73 was taken into account under the provisions of Section 117(b) of the Internal Revenue Code. One-half of such recognized gains or \$570.36 was reported in your return as income taxable to you and the balance of \$570.37 was reported as income in a separate return filed by your wife Isabelle H. Royce under Washington Community Property Law provisions. It has been

determined that such reported gain was from sales of livestock held for sale to customers in the ordinary course of your business and is therefore taxable as ordinary income rather than as a capital gain as reported. Your reported ordinary community income has accordingly been increased by \$1,140.73.

(b) In your return for the calendar year 1947, you reported the sum of \$81,286.83 as your distributive share of income of certain partnerships in which you were interested. The following tabulation shows the names and addresses of such partnerships, your distributive share of incomes reported as compared with the incomes as determined by this office and the total increase as determined.

Name of Partnership	Income Reported	Income As Corrected
Yellow Cab Company, Portland, Ore...	\$ 47,648.53	\$ 62,678.02
Necanicum Fur Farm, Seaside, Ore.....	(1,144.93)	(1,144.93)
Deluxe Attractions, Portland, Ore.....	(2,592.94)	(2,592.94)
Cloverhill Guernsey Farm, Medford, Ore.	(112.43)	None
Royce Bros., Portland, Ore.....	4,502.06	4,154.20
Queen City Garage, Seattle, Wash.....	2,934.54	3,043.24
Gray Line Tours, Seattle, Wash.....	29,039.64	29,039.64
Yellow Cab Company, Seattle, Wash....	82,932.39	89,790.87
Cloverhill Guernsey Farms, Medford, Ore.	(633.20)	None
Totals	\$162,573.66	\$184,968.10
Community share—one-half	\$ 81,286.83	\$ 92,484.05
Income reported		81,286.83
Increase		\$ 11,197.22

The adjustments of your income attributable to the revision of partnership income of the Yellow

Cab Company of Portland are shown below:

Ordinary net income reported in partnership return.... \$ 95,297.06

Unallowable deductions and additional income:

(1) Depreciation	\$9,750.67	
(2) Cost of partnership interest.....	2,908.60	
(3) Taxes and licenses.....	9,899.71	
(4) Repairs	7,500.00	30,058.98

Ordinary net income adjusted..... \$125,356.04

Your distributive share of the above-adjusted income.. \$ 62,678.02

(1) It has been determined that the depreciation allowable on taxicabs is in the amount of \$20,615.82 rather than \$30,366.49 as claimed and the net income of the partnership has been increased accordingly in the amount of \$9,750.67.

(2) On the basis of the facts and for the reasons stated heretofore, it has been determined that the sum of \$2,908.60 charged to the partnership operation for the year 1947 as compensation to Charles W. Keffer and C. H. Luton was capital in nature and not deductible in computing partnership income.

(3) It has been determined that the accrued City 2% Gross Revenue Tax in the amount of \$9,899.71 claimed as a deduction in the return filed for the calendar year 1947 was being contested by the partnership, and that the deduction is therefore unallowable.

(4) It has been determined that of the deduction claimed for repairs in the partnership return filed for the calendar year 1947, the amount of \$7,500.00 was incurred in preparing used cabs for sale. Such expenditures are therefore capital in nature and not deductible as an ordinary and necessary business expense.

(c) It has been determined that during the year 1947, you received payments totaling \$6,636.36 on a contract purchased from L. W. Hendrickson, and that your community share of the profits from such payments was in the amount of \$932.06 computed as follows:

Total Proceeds	\$25,031.14	100.0000%
Cost	18,000.00	71.9104%
<hr/>		
Profit	\$ 7,031.14	28.0896%
Payments received in 1947.....		\$6,636.36
Profit realized in 1947, \$6,636.36x28.0896%		1,864.13
50% Community		932.07
Taxable to you		932.06

(d) In your return filed for the calendar year 1947, you reported a net gain from sales or exchanges of capital assets in the amount of \$13,168.55. It has been determined that you realized a net gain from such sales or exchanges in the amount of \$9,999.10 and your net income has accordingly been decreased by the amount of \$3,169.45, computed as follows:

	Reported	Adjusted
Livestock sales	\$ 570.36	None
Farm machinery	57.26	\$ 57.26
Miscellaneous sales	(72.59)	(72.59)
Cloverhill Guernsey Dairy.....	(397.98)	None
Yellow Cab Company of Portland.....	5,928.66	5,224.33
Yellow Cab Company of Seattle.....	6,264.68	3,971.94
Gray Line Tours	347.89	347.89
Cloverhill Guernsey Farm.....	509.85	509.85
Necanicum Fur Farm.....	(39.58)	(39.58)
<hr/>		
Totals	\$13,168.55	\$ 9,999.10
Capital gains reported.....		\$13,168.55
<hr/>		
Decrease		\$ 3,169.45

It has been determined that the Yellow Cab Company of Portland understated its reported sales of used taxicabs for the year 1947 in the amount of \$15,000.00. The reported income of the partnership has accordingly been increased by \$15,000.00 and is reflected in the amount of \$5,224.33 shown above as your corrected distributive share of capital gains from such partnership.

Computation of Income Tax

Net income adjusted.....	\$86,569.24
Less: Excess of net long-term capital gain over net short-term capital loss.....	9,999.10
Ordinary net income.....	\$76,570.14
Less: Exemptions	500.00
Balance subject to tentative tax.....	\$76,070.14
Tentative tax	47,036.81
Less: 5% of tentative tax.....	2,351.84
Partial tax	\$44,684.97
Plus: 50% of \$9,999.10.....	4,999.55
Income tax liability.....	\$49,684.52
Income tax liability as disclosed by return, Account No. 6300017 - Washington.....	41,263.18
Deficiency in income tax.....	\$ 8,421.34

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51528.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.

2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegations contained in paragraph III of the petition.

4. Denies that he erred in his determination of the deficiencies in income tax and penalty as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5. (a) Admits the allegations contained in paragraph V(a) of the petition.

(b) Admits the allegations contained in the first two sentences of paragraph V(b) of the petition. Denies the remaining allegations contained in paragraph V(b) of the petition.

(c) Denies the allegations contained in paragraph V(c) of the petition. Alleges that the nature of the stock transaction including the acquisition, payment and disposition of the remaining 350 shares of Oregon Motor Stages stock was as ex-

plained on pages 2 and 3 of Exhibit A attached to the petition on file in this proceeding.

(d), (e), (f) and (g) Denies the allegations contained in paragraph V(d), (e), (f) and (g) of the petition.

(h) Admits the allegations contained in the first sentence of paragraph V(h) of the petition. Denies the remaining allegations contained in paragraph V(h) of the petition.

(i), (j) and (k) Denies the allegations contained in paragraph V(i), (j) and (k) of the petition.

(l) Admits the allegations contained in paragraph V(l) of the petition.

(m) Denies the allegations contained in paragraph V(m) of the petition.

(n) Admits that on or about November 28, 1942 the petitioner and E. Royce purchased the partnership interest of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland, a partnership. Denies the remaining allegations contained in paragraph V(n) of the petition.

(o) Admits the allegations contained in the first sentence of paragraph V(o) of the petition. Denies the remaining allegations contained in paragraph V(o) of the petition.

(p) Admits the allegations contained in the first two sentences of paragraph V(p) of the petition. Denies the remaining allegations contained in paragraph V(p) of the petition.

(q) Admits the allegations contained in the first sentence of paragraph V(q) of the petition. Admits that the amount of \$9,899.71 was claimed by the partnership as a deduction on its return for the year 1947. Denies the remaining allegations contained in paragraph V(q) of the petition.

(r) Admits that the respondent has disallowed \$7,500.00 of the expenses incurred in preparing cabs for sale, which amount was claimed by the Yellow Cab Company of Portland, a partnership, as a deduction for the calendar year 1947. Denies the remaining allegations contained in paragraph V(r) of the petition.

(s), (t) and (u) Denies the allegations contained in paragraph V(s), (t) and (u) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of the deficiencies and penalty be approved.

/s/ DANIEL A. TAYLOR,

Chief Counsel,

Internal Revenue Service.

Of Counsel: Wilford H. Payne, Associate Appellate Counsel, John D. Picco, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 23, 1954.

[Title of Tax Court and Docket No. 51529.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau Symbols ARC-Ap:SF Port:VEV:90D), dated the 28th day of September, 1953, and as a basis of his proceeding alleges as follows:

I.

The petitioner, B. Royce, is an individual residing in Vancouver, Washington. He is the surviving husband of and the duly qualified and acting Executor of the Estate of Isabelle H. Royce, deceased. The returns for the said Isabelle H. Royce for the period involved were filed with the Collector of Internal Revenue in Tacoma, Washington.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on September 28, 1953.

III.

The Commissioner determined a deficiency in income tax for the years and in the amounts as follows:

		Sec. 294(d) (2)
Year	Deficiency	Penalty
1945	\$31,913.80	\$2,588.89
1946	11,435.22	—
1947	8,421.36	—
Totals	<u>\$51,770.38</u>	<u>\$2,588.89</u>

of which the total amount is in controversy.

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. The respondent erred in including as petitioner's share of community income in 1945 the sum of \$21,875.00, or any other amount, as income to petitioner from the Oregon Motor Stages stock transaction.

2. The respondent erred in determining additional community income to petitioner in 1945 in the amount of \$519.05, or any other amount, as additional income from the Oregon Motor Stages stock transaction.

3. The respondent erred in increasing petitioner's community income in the year 1945 in the amount of \$2,951.55, in the year 1946 in the amount of \$2,201.76, and in the year 1947 in the amount of \$1,140.73, or any other amounts, from the sales of livestock made in those years.

4. The respondent erred in increasing the petitioner's partnership income in the year 1945 in the amount of \$10,612.61, or any other amount.

5. The respondent erred in increasing the decedent's community share of capital gains from the partnership Yellow Cab Company of Portland, in the amount of \$10.96, or any other amount, for the year 1945.

6. The respondent erred in increasing the petitioner's community share of partnership income in

the year 1946 by the amount of \$13,173.30 and in the year 1947 by the amount of \$11,197.22, or any other amounts.

(a) The respondent erred in determining that the Yellow Cab Company of Portland, a partnership, had claimed excessive depreciation in the amount of \$3,034.93 for the year 1946, and in the amount of \$9,750.67 for the year 1947, or any other amounts.

(b) The respondent erred in determining that payments made by the Yellow Cab Company of Portland, a partnership, to Charles W. Keffer and C. H. Luton in the amount of \$4,986.38 for the year 1946, and in the amount of \$2,908.60 for the year 1947, or any other amounts, are not deductible in computing said partnership income for said years.

7. The respondent erred in determining that petitioner received taxable income in the amount of \$932.06 in the year 1946, and in the amount of \$932.06 for the year 1947, or any other amounts, on the purchase of a lease by petitioner from L. W. Hendrickson.

8. The respondent erred in increasing the petitioner's community share of long-term capital gains from the Yellow Cab Company of Portland by the amount of \$11.16, or any other amount, for the year 1946.

9. The respondent erred in determining that the sum of \$9,899.71, or any other amount, accrued as a city revenue tax in the year 1947 by the Yellow

Cab Company of Portland, a partnership, was unallowable as a deduction.

10. The respondent erred in determining that the Yellow Cab Company of Portland, a partnership, expended the sum of \$7500.00 in preparing used cabs for sale, and in disallowing said amount, or any part thereof, as a deduction to the said partnership for the year 1947.

11. The respondent erred in asserting a penalty in any amount under Section 294(d)(2), Internal Revenue Code, or any other section.

V.

The facts upon which petitioner relies as a basis for this appeal are as follows:

(a) During all of the years involved herein, petitioner, Isabelle H. Royce, was married to B. Royce, and they resided in Vancouver, Washington, and she reported her income for Federal income tax purposes on the basis of a calendar year and cash receipts and disbursements.

(b) During the year 1945 the said B. Royce and a number of associates entered in the negotiations with the then stockholders of Oregon Motor Stages for the acquisition of the outstanding stock of said corporation. There were outstanding at that time 750 shares of stock of said company and the price upon which the negotiations were based was \$1,000.00 per share. The said B. Royce, Albert L. Schneider, E. Royce, F. C. Niederkrome and R. T. Jacob began preparations for the acquisition of said stock, but Mr. L. R. Bentson of Vancouver,

B. C., who is a relative of the said B. Royce, and E. Royce, informed the group that he desired to acquire a portion of the stock and agreed to and did purchase 350 shares of said stock.

(c) In the acquisition of his stock Mr. Bentson advised the group that his funds were in Canada and were blocked, and that it would be necessary for him to make arrangements to finance his purchase. Accordingly, a loan was negotiated on his behalf with the Portland Branch of the American Business Credit Corporation. In the transaction, petitioner B. Royce loaned his stock as an accommodation to be pledged with Mr. Bentson's stock as security for said loan, but B. Royce did not participate in the negotiation of said loan and had no obligation whatsoever for its repayment.

(d) After the conclusion of World War II in August, 1945, Mr. Bentson became apprehensive that the earnings of the corporation would be drastically curtailed and that the investment would not prove as profitable in the matter of liquidating his obligation as he had anticipated at the time of its purchase. Mr. Bentson then made an offer to the corporation to surrender his 350 shares of stock upon the corporation paying the interest on his obligation and liquidating the loan from the said Portland Branch of the American Business Credit Corporation. Upon the surrender of his shares of stock, Oregon Motor Stages issued to Mr. Bentson a check for the sum of \$350,000.00, which said check the said Mr. Bentson delivered to the American Business Credit Corporation in payment of his said loan.

(e) The said B. Royce did not receive any part of said payment from Oregon Motor Stages, either directly, indirectly or constructively, nor did he receive any benefit directly or indirectly from the payment of the said sum to the said Mr. Bentson. The value of B. Royce's stock in said Oregon Motor Stages was not enhanced in value by the surrender of the stock of the said Mr. Bentson, but the value thereof was, in fact, depreciated by the surrender of said stock by the said Bentson and the distribution of the corporation's cash to him, and the company's operations were curtailed thereby thereafter.

(f) The cancellation or redemption or purchase by Oregon Motor Stages was of all the stock of a particular stockholder, Mr. Bentson, and he thereafter ceased to be interested in the affairs of the corporation and neither Mr. Bentson or any other member of the said group retained any beneficial or other interest in said stock thereafter. Neither Mr. Bentson nor any other member of the said group realized any economic, taxable or other gain of any character from the transaction. There was no prorata or any other type of distribution from the corporation to the stockholders.

(g) The facts as set forth in the immediately preceding paragraphs above apply with equal force and effect to the item of \$519.05, included by the respondent in petitioner's income for the year 1945 as an additional distribution from the Oregon Motor Stages stock transaction to the petitioner.

(h) During each of the years herein involved,

the petitioner and her said husband, B. Royce, operated a farm in the State of Washington. The principal function of the farm operation was for the production of milk for bottle distribution and the operation of the farm also included the production of purebred Guernsey stock, which latter production was primarily for the purpose of producing milk cows to support the sale and distribution of milk.

(i) Before the preparation of their tax returns for each of the years in question, petitioner and her husband, B. Royce, had their accountant prepare a list of the livestock sold during the year. This list indicated each individual animal sold, the date it was acquired and whether or not it was an animal intended for petitioner's herd or raised for sale in the ordinary course of business. All animals culled from the general herd as not being desirable animals to be included therein were treated as animals held for sale in the ordinary course of business and the profit realized therefrom was treated on all of petitioner's returns as ordinary income.

(j) The animals retained by petitioners as part of their breeding herd constituted property used in the trade of business of the petitioners, and the petitioners treated the gain or loss on the sale of any of these animals during the years herein involved, and where the animals had been held for more than six months, as being capital gain or capital loss transactions. It was the practice of the petitioner and her husband to hold the animals for substantially their full period of usefulness prior to selling the same.

(k) The respondent has not set forth the facts which form the basis for the purported increase in partnership income in the amount of \$10,612.61 made by him in petitioner's income for the calendar year 1945. Petitioner therefore alleges on information and belief that the return as filed by her with regard to the partnership income reported by her was correct in every respect.

(l) For the years 1946 and 1947, the respondent has determined that the Yellow Cab Company of Portland, a partnership, claimed excessive depreciation in the amounts of \$3,034.93 and \$9,750.67, respectively.

(m) The Yellow Cab Company of Portland, a partnership, has for a number of years, followed the consistent practice of using a straight line method of depreciation and completely writing off all of its taxicabs over a four year period. The depreciation claimed by the said Yellow Cab Company of Portland for said years constituted a reasonable allowance for exhaustion, wear and tear (including a reasonable allowance for obsolescence), under normal circumstances.

(n) On or about the 28th day of November, 1942, petitioner's husband, B. Royce, and E. Royce purchased the partnership interest of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland, a partnership, for a cash consideration. At the same time the partnership entered into a profit-sharing agreement with the said Charles Keffer and C. H. Luton, whereby each would be

entitled to a certain percentage of the partnership profits thereafter as long as it was mutually agreeable that the said individuals continue in the employment of the partnership. The percentage of profit payments made under these agreements were properly deducted by the partnership in computing its net income for the years herein involved.

(o) On or about December 6, 1945, petitioner's husband, B. Royce, in consideration of the payment by him of \$18,000.00, acquired an assignment of the balance due L. W. Hendrickson under his lease of property to Burnside Realty, Inc., and of the balance to be due under the option to purchase said property given to E. Royce. The assignment recited that thirty-four payments of \$553.03 per month were then due from Burnside Realty, Inc., and the sum of \$6,555.65 "on the date said option is closed." Said option could not be closed until the year 1949, if at all.

(p) The said B. Royce received payment from Burnside Realty, Inc. under said assignment of \$6,636.36 in the year 1946 and the same amount in the year 1947. Neither petitioner nor her husband, B. Royce, reported any gain on the transaction until B. Royce had recovered his investment of \$18,000.00, which did not occur until 1948. Petitioner and B. Royce could not determine until the year 1948 whether or not the rent payments would be fully made and the option would be exercised and thus whether any gain would be realized. The value of B. Royce's contract rights depended on uncertain future payments.

(q) During the calendar year 1947, the City of Portland assessed a city 2% gross revenue tax in the amount of \$9,899.71 against the Yellow Cab Company of Portland, a partnership. This said sum was accrued on the books of the Yellow Cab Company of Portland in the year of 1947 and was claimed by said partnership as a deduction on its return for the said year, in accordance with the method of accounting regularly employed in keeping its books of account.

(r) The respondent has disallowed \$7500.00 of the repair expenses claimed by the Yellow Cab Company of Portland, a partnership, as a deduction for the calendar year 1947, said disallowance being based upon the theory that the said company made capital expenditures of \$100.00 per cab sold in that year in preparing and painting each cab for sale.

(s) The Yellow Cab Company of Portland, a partnership, maintains its own garage and staff of mechanics and makes any and all repairs necessary to its cabs therein. The repair and painting expenses incurred by the said company represent repairs required in the ordinary course of business, and were charged to the account of repairs and maintenance in accordance with the method of accounting regularly employed and established many years before.

(t) The respondent has not set forth the facts which form the basis for his increase of petitioner's partnership income from the Yellow Cab Company of Seattle, Washington for the year 1947, nor for his increase in partnership income of petitioner

from the Queen City Garage, Seattle, Washington. Petitioner therefore alleges on information and belief that the partnership income reported by her on her return for said year correctly reflected the correct partnership income in said enterprises for said year.

(u) Petitioner reported on her estimated tax for the year 1945 the full amount of tax estimated to be due and owing for said year and the penalty proposed for the said year is without foundation.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income taxes for any of the years 1945, 1946 and 1947 and that petitioner is not subject to any penalties determined by the respondent, or any part thereof.

/s/ R. T. JACOB

Of Counsel: Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

1112 Cascade Building, Portland 4, Oregon

September 28, 1953

ARC-AP:SF Port:VEV:90D

Estate of Isabelle H. Royce, Deceased,
Mr. B. Royce, Executor,
306 West 21st Street,
Vancouver, Washington.

Dear Mr. Royce:

You are advised that the determination of the

income tax liability of the Estate of Isabelle H. Royce, Deceased, for the taxable years ended December 31, 1945, 1946 and 1947, discloses deficiencies in the total amount of \$51,770.38 and a penalty of \$2,588.89 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or

on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner.

By /s/ A. N. WILLIAMS,
Associate Chief, Appellate Division.

Enclosures: Statement Form 1276 Agreement Form 870.

VEVelenela

ARC-Ap:SF

Port:VEV:90D

STATEMENT

Estate of Isabelle H. Royce, Deceased
B. Royce, Executor,
306 West 21st Street,
Vancouver, Washington

Income tax liability for the taxable years ended December 31, 1945, 1946 and 1947.

Sec. 294(d) (2)

Year	Deficiency	Penalty
1945	\$31,913.80	\$2,588.89
1946	11,435.22	—
1947	8,421.36	—
Totals	<u>\$51,770.38</u>	<u>\$2,588.89</u>

In making this determination of the decedent's income tax liability, careful consideration has been given to the report of examination dated February 20, 1951, and to your protest dated August 17, 1951.

The 6% penalty for the substantial underestimate

of estimated tax has been asserted for the taxable year ended December 31, 1945, in accordance with the provisions of section 294(d)(2) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Robert T. Jacob, 917 Public Service Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1945			
Adjustments to Net Income			
Net income as disclosed by return, Form 1040.....			\$103,416.14
Unallowable deductions and additional income:			
(a) Dividends (Oregon Motor Stages) ..	\$21,875.00		
(b) Additional distribution (Oregon			
Motor Stages)	519.05		
(c) Farm loss	2,951.55		
(d) Partnership income	10,612.61	35,958.21	
Total			\$139,374.35
Non-taxable income and additional deductions:			
(e) Capital gains	\$ 1,464.82		
(f) Interest expense	467.47	1,932.29	
Net income adjusted.....			\$137,442.06

Explanation of Adjustments

(a) It has been determined that by reason of a transaction whereby the Oregon Motor Stages acquired 350 shares of its stock issued in the name of L. R. Bentson, the marital community realized taxable community income in the amount of \$43,750.00, of which one-half, or \$21,875.00, is taxable to decedent.

(b) It has been further determined that in connection with the transaction whereby Oregon Motor Stages acquired 350 shares of its stock, that that corporation paid interest to the American Business Credit Corporation and attorney fees in the respective total amounts of \$8,054.80 and \$2,135.41. With respect to these sums, this office holds that to the extent of \$1,006.85 and \$31.25, respectively, payment of interest and attorney fees was in satisfaction of a personal liability of B. Royce incurred in connection with the transaction whereby he acquired the stock of Oregon Motor Stages and is income of the marital community. The decedent's reported income has therefore been increased by \$519.05, being one-half of a total of \$1,006.85 and \$31.25.

(c) It has been determined that the farm loss of the marital community for the calendar year 1945 was in the amount of \$23,691.68 rather than \$29,594.78 as reported in decedent's return, and decedent's community share was therefore \$11,845.84 rather than \$14,797.39 as reported. The reported net income has accordingly been increased by the amount of \$2,951.55. This increase consists of one-half of the gains from the sales of livestock totaling \$5,903.10, which this office holds was from sales to customers in the ordinary course of business rather than capital gains, as reported.

(d) It has been determined that the marital community received partnership income for the calendar year 1945 in the amount of \$252,484.63 and that one-half of such sum, or \$126,242.32 is taxable as

decedent's separate income. The reported partnership income in the amount of \$115,629.71 has therefore been increased by the amount of \$10,612.61.

(e) In the return filed by the decedent for the calendar year 1945, recognized capital gains were reported in the amount of \$3,271.58. It has been determined that the correct amount of capital gains taxable to decedent is in the amount of \$1,860.76 and the reported net income has therefore been decreased by the amount of \$1,464.82, such decrease consisting of the following adjustments:

(1) Partnership capital gains.....	\$ 10.96
(2) Sales of livestock	(1,475.78
Decrease	(\$1,464.82)

(1) It has been determined that decedent's community share of the capital gains from the partnership Yellow Cab Company of Portland, Oregon, was in the amount of \$141.25, rather than \$130.29 as reported in decedent's 1945 return, and the reported capital gains have accordingly been increased by the amount of \$10.96.

(2) In the return filed by the decedent for the calendar year 1945, a net long-term capital gain from the sale or exchange of livestock purchased or raised was reported in the amount of \$2,955.30, of which one-half, or \$1,477.65, was included as taxable income of decedent under the State of Washington community property law provisions. It has been determined that the correct amount of gains from the sale of livestock was in the amount of

\$7.49, of which 50%, or \$3.75, is recognized and that decedent's community share thereof is in the amount of \$1.87. The reported capital gains have therefore been decreased in the amount of \$1,475.-78. See Item (c) above.

(f) It has been determined that of the amount of \$1,006.85 held under item (b) above to be taxable income of the marital community, the sum of \$467.-47 is allowable as a deduction for interest paid in computing decedent's income for the year 1945.

Taxable Year Ended December 31, 1945

Computation of Income Tax

Net income adjusted.....	\$137,442.06
Less: Excess of net long-term capital gains over net short-term capital loss.....	1,806.76
Ordinary net income.....	\$135,637.30
Less: Normal tax exemption.....	500.00
Balance subject to normal tax.....	\$135,137.30
Normal tax—3% of \$135,137.30.....	\$ 4,054.12
Ordinary net income.....	\$135,637.30
Less: Surtax exemptions.....	500.00
Balance subject to surtax.....	\$135,137.30
Surtax	98,592.20
Partial tax	\$102,646.32
Plus: 50% of \$1,806.76.....	903.38
Income tax liability.....	\$103,549.70
Income tax liability disclosed by return:	
Account No. 3015686 - Washington.....	71,635.90
Deficiency in income tax.....	\$ 31,913.80

Taxable Year Ended December 31, 1945—(Continued)

Penalty, section 294(d)(2), Internal Revenue Code—Year 1945:		
Income tax liability as adjusted.....		\$103,549.70
Less: Withholding tax.....	None	
Paid on estimated declaration.....	\$60,401.60	60,401.60
Difference		<u>\$ 43,148.10</u>
Penalty (6% of \$43,148.10).....		<u><u>\$ 2,588.89</u></u>

Taxable Year Ended December 31, 1946

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....		\$ 94,537.80
Unallowable deductions and additional income:		
(a) Net gain from sale of other than capital assets	\$ 26.23	
(b) Partnership income	13,173.30	
(c) Other income	932.07	14,131.60
Total		<u>\$108,669.40</u>
Non-taxable income and additional deductions:		
(d) Capital gains		654.62
Net income adjusted.....		<u><u>\$108,014.78</u></u>

Explanation of Adjustments

(a) It has been determined that of the long-term capital gains and losses reported in the decedent's return, the net amount of \$26.23 constitutes ordinary income from the sale of other than capital assets, and the reported income has been increased accordingly by the sum of \$26.23 computed as follows:

(1) Gains from sale of livestock.....	\$2,201.77
(2) Losses from sale of livestock.....	(1,961.56)
(3) Yellow Cab Company of Seattle.....	(213.98)
Net increase	<u><u>\$ 26.23</u></u>

(1) In the return filed by the decedent for the

calendar year 1946, long-term capital gains of the marital community were reported from the sale of livestock raised and purchased in the total amount of \$5,111.53, of which one-half was taxable to decedent as community income. It has been determined that of such sales the sum of \$4,403.53 were sales of livestock held for sale in the ordinary course of business. The gains from the sale of livestock, reported by decedent as sales of property other than capital assets, has accordingly been increased by one-half of \$4,403.53, or \$2,201.77.

(2) In the return filed by the decedent for the calendar year 1946, long-term capital losses of the marital community were reported from the sale of livestock purchased in the total amount of \$3,923.12, of which one-half was decedent's community share. It has been determined that the loss of \$3,923.12 was from the sale of livestock held for sale to customers in the ordinary course of business. Decedent's gains from the sale of livestock, reported as sales of property other than capital assets, has accordingly been decreased by one-half of \$3,923.12, or \$1,961.56.

(3) In the decedent's return filed for the calendar year 1946 the sum of \$213.98 was reported as her community portion of the net short-term capital loss of the partnership Yellow Cab Company of Seattle. It has been determined that such reported loss was from the sale of property other than capital assets and decedent's reported income from the sale of other than capital assets has accordingly been decreased by the amount of \$213.98.

(b) It has been determined that the marital com-

munity received partnership income for the calendar year 1946 in the amount of \$253,002.14 and that decedent's community share is \$126,501.07 rather than \$113,327.77 as reported. The reported partnership income has accordingly been increased by the amount of \$13,173.30, computed as follows:

	Corrected Income
Royce Brothers	\$ 5,989.42
Queen City Garage.....	3,014.96
The Gray Line Tours	12,598.66
Cloverhill Guernsey Farm.....	(8,817.50)
Necanicum Fur Farm.....	(2,082.98)
Yellow Cab Company of Seattle.....	116,565.17
Yellow Cab Company of Portland.....	125,734.41
Total partnership income as corrected.....	<u>\$253,002.14</u>
Community share, one-half.....	<u>\$126,501.07</u>
Reported	<u>113,327.77</u>
Increase	<u><u>\$ 13,173.30</u></u>

In the partnership return filed by the Yellow Cab Company of Portland for the calendar year 1946, the distributive share of the ordinary net income of the marital community was shown as being in the amount of \$121,723.76. It has now been determined that the distributive share of the marital community from such partnership is in the amount of \$125,734.41, computed as follows:

Ordinary net income as disclosed by return.....	\$243,447.51
Unallowable deductions and additional income:	
(1) Depreciation	\$3,034.93
(2) Cost of partnership interest.....	4,986.38 8,021.31
Ordinary net income adjusted.....	<u>\$251,468.82</u>
Decedent's distributive share.....	<u><u>\$125,734.41</u></u>

(1) It has been determined that the depreciation allowable on taxicabs is in the amount of \$2,102.68 rather than \$5,137.61 as claimed, and the ordinary net income of the partnership has been increased accordingly in the amount of \$3,034.93.

(2) The record shows that prior to August 1, 1942, Charles W. Keffer and C. H. Luton were the owners of .659% and .906% interests, respectively, in the partnership Yellow Cab Company of Portland. On or about that date, August 1, 1942, B. Royce, and his brother, E. Royce, purchased the interests of these individuals under an agreement whereby, inter alia, each of the vendors was to receive 1% of the partnership net profits for a period of five years.

During the year under review, payments to them were charged to partnership operation as compensation. This office holds that payments made in 1946 totaling \$4,986.38 made by the partnership under the contract and in the manner referred to in the preceding paragraph were capital in nature and not deductible in computing partnership income.

(c) It has been determined that during the year 1946 the marital community received payments totaling \$6,636.36 upon a contract purchased by B. Royce from L. W. Hendrickson, and that the decedent's community share of the profits from such payments is in the amount of \$932.07, computed as follows:

Total proceeds	\$25,031.14	100.0000%
Cost	\$18,000.00	71.9104%
Profit		<u>28.0896%</u>

Payments received in 1946.....	\$6,636.36
Profit realized in 1947—\$6,636.36x28.0896%	\$1,864.13
50% Community	\$ 932.06
Taxable to decedent.....	\$ 932.07

(d) It has been determined that decedent's community share of capital gains for the calendar year 1946 is in the amount of \$3,158.90 rather than \$3,813.52 as reported in her return filed for the calendar year 1946, and such reported capital gains have accordingly been decreased by the amount of \$634.62, computed as follows:

(1) Capital gains from sale of livestock.....	(\$1,100.89)
(2) Capital loss from sale of livestock.....	980.78
(3) Yellow Cab Company of Portland.....	11.16
(4) Yellow Cab Company of Seattle.....	(445.67)
(5) Mathematical error	(100.00)
Decrease	<u>(\$ 654.62)</u>

(1) It has been determined that of the long-term capital gains from the sale of livestock reported in decedent's return filed for the calendar year 1946, the amount of \$2,201.77 was from the sale of livestock held for sale to customers in the ordinary course of business and is therefore ordinary income. The decedent's reported capital gains are therefore decreased by the amount of 50% of such gains, or \$1,100.89.

(2) It has been determined that of the long-term capital losses from the sale of livestock reported in decedent's return filed for the calendar year 1946, the amount of \$1,961.56 was from the sale of livestock held for sale to customers in the ordinary

course of business and is therefore an ordinary loss. The decedent's reported capital gains are therefore increased by the amount of 50% of such losses, or \$980.78.

(3) It has been determined that decedent's community share of the long-term capital gains reported in the partnership return of Yellow Cab Company of Portland is in the amount of \$143.75 rather than \$132.59 as reported in her return filed for the calendar year 1946. The reported capital gains are therefore increased by the amount of \$11.16.

(4) In the return filed by the decedent for the calendar year 1946, there was reported as her community share of the capital gains of the partnership Yellow Cab Company of Seattle, a net long-term capital gain of \$251.75 and a net short-term capital loss of \$213.98. It has been determined that the partnership realized a net long-term capital loss of \$3,199.25, of which decedent's distributive community share was \$407.90, and that the partnership realized no short-term capital gains or losses. The reported net capital gains have accordingly been decreased by the amount of \$445.67.

(5) The decedent in her return filed for the calendar year 1946, erroneously reported 50% of long-term capital losses in the amount of \$2,468.97 as being \$1,134.48, rather than \$1,234.48. The reported capital gains are accordingly decreased by the amount of \$100.00.

Taxable Year Ended December 31, 1946

Computation of Income Tax

Net income adjusted.....	\$108,014.78
Less: Excess of net long-term capital gain over net short-term capital loss.....	3,158.90
Ordinary net income.....	\$104,855.88
Less: Exemption	500.00
Balance subject to tentative tax.....	\$104,355.88
Tentative tax	\$ 71,196.73
Less: 5% of tentative tax.....	3,559.84
Partial tax	\$ 67,636.89
Plus: 50% of \$3,158.90.....	1,579.45
Income tax liability.....	\$ 69,216.34
Income tax liability as disclosed by return:	
Account No. 3022246 - Washington.....	57,781.12
Deficiency in income tax.....	\$ 11,435.22

Taxable Year Ended December 31, 1947

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$76,468.68
Unallowable deductions and additional income:	
(a) Sales of other than capital assets.....	\$ 1,140.74
(b) Partnership income	11,197.22
(c) Other income	932.07 13,270.03
Total	\$89,738.71
Non-taxable income and additional deductions:	
(d) Capital gains	3,169.45
Net income adjusted.....	\$86,569.26

Explanation of Adjustments

(a) In the income tax return filed by the decedent for the calendar year 1947, she reported a net capital gain of \$2,281.47 from the sale of livestock purchased and raised, of which 50%, or \$1,140.74,

was taken into account under the provisions of section 117(b) of the Internal Revenue Code. One-half of such recognized gain, or \$570.37, was reported in decedent's return as taxable income to her and the balance of \$570.36 was reported as income in the separate return filed by B. Royce under Washington community property law provisions. It has been determined that such reported gain was from sale of livestock held for sale to customers in the ordinary course of business and is therefore taxable as ordinary income rather than as a capital gain as reported. The reported ordinary community income has accordingly been increased by \$1,140.74.

(b) In the return filed by the decedent for the calendar year 1947, she reported the sum of \$81,-286.83 as her distributive share of income of certain partnerships. The following tabulation shows the names and addresses of such partnerships, the decedent's distributive share of incomes reported as compared with the incomes as determined by this office and the total increase as determined:

Name of Partnership	Income Reported	Income As Corrected
Yellow Cab Company, Portland, Ore...	\$ 47,648.53	\$ 62,678.02
Necanicum Fur Farm, Seaside, Ore.....	(1,144.93)	(1,144.93)
Deluxe Attractions, Portland, Ore.....	(2,592.94)	(2,592.94)
Cloverhill Guernsey Farm, Medford, Ore.	(112.43)	None
Royce Bros., Portland, Ore.....	4,502.06	4,154.20
Queen City Garage, Seattle, Wash.....	2,934.54	3,043.24
Gray Line Tours, Seattle, Wash.....	29,039.64	29,039.64
Yellow Cab Company, Seattle, Wash....	82,932.39	89,790.87
Cloverhill Guernsey Farms, Medford, Ore.	(633.20)	None
Totals	<u>\$162,573.66</u>	<u>\$184,968.10</u>

Community share—one-half	\$ 81,286.83	\$ 92,484.05
Income reported		81,286.83
		<hr/>
Increase		\$ 11,197.22
		<hr/> <hr/>

The adjustments of decedent's income attributable to the revision of partnership income of the Yellow Cab Company of Portland are shown below:

Ordinary net income reported in partnership return.... \$ 95,297.06
 Unallowable deductions and additional income:

(1) Depreciation	\$9,750.67	
(2) Cost of partnership interest.....	2,908.60	
(3) Taxes and licenses.....	9,899.71	
(4) Repairs	7,500.00	30,058.98
	<hr/>	<hr/>

Ordinary net income adjusted..... \$125,356.04

Decedent's distributive share of the above-
 adjusted income \$ 62,678.02

(1) It has been determined that the depreciation allowable on taxicabs is in the amount of \$20,615.82 rather than \$30,366.49 as claimed and the net income of the partnership has been increased accordingly in the amount of \$9,750.67.

(2) On the basis of the facts and for the reasons stated heretofore, it has been determined that the sum of \$2,908.60 charged to the partnership operation for the year 1947 as compensation to Charles W. Keffer and C. H. Luton was capital in nature and not deductible in computing partnership income.

(3) It has been determined that the accrued City 2% Gross Revenue Tax in the amount of \$9,899.71

claimed as a deduction in the return filed for the calendar year 1947 was being contested by the partnership, and that the deduction is therefore unallowable.

(4) It has been determined that of the deduction claimed for repairs in the partnership return filed for the calendar year 1947, the amount of \$7,500.00 was incurred in preparing used cabs for sale. Such expenditures are therefore capital in nature and not deductible as an ordinary and necessary business expense.

(c) It has been determined that during the year 1947, B. Royce received payments totaling \$6,636.36 upon a contract purchased by him from L. W. Hendrickson, and that the decedent's community share of the profits from such payments was in the amount of \$932.70, computed as follows:

Total proceeds	\$25,031.14	100.0000%
Cost	18,000.00	71.9104%
Profit	<u>\$ 7,031.14</u>	<u>28.0896%</u>
Payment received in 1947.....		\$6,636.36
Profit realized in 1947—\$6,636.36x28.0896%		\$1,864.13
50% Community		\$ 932.06
Taxable to decedent		\$ 932.07

(d) In the return filed by the decedent for the calendar year 1947, a net gain was reported from sales or exchanges of capital assets in the amount of \$13,168.55. It has been determined that a net gain from such sales or exchanges was realized in the amount of \$9,999.10, and the reported net income has accordingly been decreased by the amount of \$3,169.45, computed as follows:

	Reported	Adjusted
Livestock sales	\$ 570.36	None
Farm machinery	57.26	\$ 57.26
Miscellaneous sales	(72.59)	(72.59)
Cloverhill Guernsey Dairy.....	(397.98)	None
Yellow Cab Company of Portland.....	5,928.66	5,224.33
Yellow Cab Company of Seattle.....	6,264.68	3,971.94
Gray Line Tours.....	347.89	347.89
Cloverhill Guernsey Farm.....	509.85	509.85
Necanicum Fur Farm.....	(39.58)	(39.58)
	<hr/>	<hr/>
Totals	\$13,168.55	\$ 9,999.10
	<hr/>	<hr/>
Capital gains reported.....		13,168.55
		<hr/>
Decrease		\$ 3,169.45
		<hr/>

Taxable Year Ended December 31, 1947

Computation of Income Tax

Net income adjusted	\$86,569.26
Less: Excess of net long-term capital gain over net short-term capital loss.....	9,999.10
	<hr/>
Ordinary net income.....	\$76,570.16
Less: Exemption	500.00
	<hr/>
Balance subject to tentative tax.....	\$76,070.16
	<hr/>
Tentative tax	\$47,036.83
Less: 5% of tentative tax.....	2,351.84
	<hr/>
Partial tax	\$44,684.99
Plus: 50% of \$9,999.10.....	4,999.55
	<hr/>
Income tax liability.....	\$49,684.54
Income tax liability disclosed by return:	
Account No. 300018 - Washington.....	41,263.18
	<hr/>
Deficiency in income tax.....	\$ 8,421.36
	<hr/>

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51529.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the petition.

2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegations contained in paragraph III of the petition.

4. Denies that he erred in his determination of the deficiencies in income tax and penalty as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5. (a) Admits the allegations contained in paragraph V(a) of the petition.

(b) Admits the allegations contained in the first two sentences of paragraph V(b) of the petition. Denies the remaining allegations contained in paragraph V(b) of the petition.

(c), (d), (e), (f) and (g) Denies the allegations contained in paragraph V(c), (d), (e), (f) and (g) of the petition.

(h) Admits the allegations contained in the first sentence of paragraph V(h) of the petition. Denies the remaining allegations contained in paragraph V(h) of the petition.

(i), (j) and (k) Denies the allegations contained in paragraph V(i), (j) and (k) of the petition.

(l) Admits the allegations contained in paragraph V(l) of the petition.

(m) Denies the allegations contained in paragraph V(m) of the petition.

(n) Admits that on or about November 28, 1942 petitioner's husband, B. Royce, and E. Royce purchased the partnership interest of Charles Keffer and C. H. Luton in the Yellow Cab Company of Portland, a partnership. Denies the remaining allegations contained in paragraph V(n) of the petition.

(o) Admits the allegations contained in the first sentence of paragraph V(o) of the petition. Denies the remaining allegations contained in paragraph V(o) of the petition.

(p) Admits the allegations contained in the first two sentences of paragraph V(p) of the petition. Denies the remaining allegations contained in paragraph V(p) of the petition.

(q) Admits the allegations contained in the first sentence of paragraph V(q) of the petition. Admits that the amount of \$9,899.71 was claimed by the partnership as a deduction on its return for the year 1947. Denies the remaining allegations contained in paragraph V(q) of the petition.

(r) Admits that the respondent has disallowed \$7,500.00 of the expenses incurred by the Yellow Cab Company of Portland, a partnership, in preparing cabs for sale, which amount was claimed by

the partnership as a deduction for the calendar year 1947. Denies the remaining allegations contained in paragraph V(r) of the petition.

(s), (t) and (u) Denies the allegations contained in paragraph V(s), (t) and (u) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of the deficiencies and penalty be approved.

/s/ DANIEL A. TAYLOR, WHP
Chief Counsel, Internal Revenue
Service.

Of Counsel: Wilford H. Payne, Associate Appellate
Counsel, John D. Picco, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 23, 1954.

[Title of Tax Court and Docket No. 51531.]

PETITION

The above named petitioners hereby petition the above entitled Court for a redetermination of the deficiency set forth by the respondent in his Notice of Deficiency (Bureau Symbols ARC-Ap:SF Port: VEV:90D) dated the 28th day of September, 1953, and as a basis for this proceeding alleges as follows:

I.

Petitioners are husband and wife residing in Portland, Multnomah County, State of Oregon, and filed their Federal income tax returns for the year involved herein with the Collector of Internal Revenue for the District of Oregon at Portland, Oregon.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner from Portland, Oregon, September 28, 1953.

III.

The amount and character of the alleged deficiency is as follows:

Year	Deficiency	Sec. 294(d)(2) Penalty
1945	\$66,977.56	\$4,035.66

IV.

In arriving at the alleged deficiency the respondent has committed the following errors:

1. He erred in including in petitioners' income as dividends from Oregon Motor Stages the sum of \$87,500.00, or any sum whatsoever.

2. He further erred in including in petitioners' income as an additional distribution from Oregon Motor Stages or as income of any character the sum of \$2,076.02, or any sum whatsoever.

3. The respondent further erred in asserting a penalty of \$4,035.66, or any sum whatsoever, as set out in said Notice of Deficiency for filing an underestimate of estimated tax for the year in controversy.

V.

The facts upon which petitioners rely as a basis for this appeal are as follows:

(a) Taxpayers were husband and wife living together during the entire year 1945 and were entitled to three additional exemptions by reason of dependency, kept their records and reported income on the basis of cash receipts and disbursements.

(b) During the month of June, 1945, petitioner, Robert T. Jacob, and other associates, entered into negotiations with the then stockholders of Oregon Motor Stages for the acquisition of the outstanding stock of that company.

(c) During the negotiations, Mr. L. R. Bentson, residing at 411 East 15th Street, North Vancouver, B. C., an uncle of E. and B. Royce, came to Portland to visit his said nephews and while here learned of the negotiations in progress. On several occasions prior thereto, either while visiting in Portland or during visits of the Royces in Vancouver, Mr. Bentson had stated to his nephews that he was desirous of acquiring an interest in some of their business transactions and upon being told of the pending negotiations, expressed a desire to participate.

(d) The desires of Mr. Bentson were communicated to petitioner and other members of the group and all consented to the entry into the pool by Mr. Bentson. Shares of said stock were thereupon subscribed for and paid for upon the basis of \$1,000.00 per share as follows:

	No. of Shares	Cost
E. Royce	145	\$145,000.00
B. Royce	50	50,000.00
Fred C. Niederkrome	55	55,000.00
A. L. Schneider.....	50	50,000.00
Robert T. Jacob.....	100	100,000.00
L. R. Bentson.....	350	350,000.00
	<hr/>	<hr/>
	750	\$750,000.00

(e) Prior to Mr. Bentson's visit to Portland, petitioner, Robert T. Jacob, had made arrangements for the acquisition of additional shares of said stock and he, of his own personal knowledge, was acquainted with the fact that other members of the negotiating group were making arrangements for the acquisition of additional shares of said stock and were in contact with men in Seattle and San Francisco who desired to purchase some of said stock, but when we were informed of Mr. Bentson's desire to acquire shares, discontinued the arrangements and we confined our activities to the acquisition of the shares of stock indicated above.

(f) Petitioner, Robert T. Jacob, was informed at the time that the said Bentson had been a successful mine operator in Alaska and that he was a man of considerable means; that Canadian funds were blocked because of the existence of war regulations; that the said Bentson had a niece residing in the City of Portland for whom he was desirous of creating an estate in the United States; that the acquisition by the said Bentson of shares of stock of Oregon Motor Stages appeared to him to afford a desirable vehicle for the accomplishment of that purpose; that he, the said Bentson, had been in-

formed of the earnings and dividend record of the said Oregon Motor Stages and was enthusiastic over the possibilities of his being able to build up the estate he desired for his said niece; and consequently, he requested permission to enter the pool.

(g) That petitioner, Robert T. Jacob's acquaintance with the said Bentson convinced him that the said Bentson would be a desirable associate in the ownership of the said stock and although petitioners were willing, able and had made arrangements to acquire additional stock, he acquiesced in Bentson's request to become a purchaser of said stock.

(h) That although petitioner, Robert T. Jacob, surrendered his stock to the said Bentson to be pledged as security for a loan obtained by the said Bentson from the American Business Credit Corporation, he was not an obligor upon the note of the said Bentson to said corporation, and received no benefit therefrom either from the advancing of said monies or from the later retirement of said stock.

(i) On or about August or September, 1945, Mr. Bentson offered to surrender his 350 shares of stock to the corporation for the corporation's promise to pay off his obligation to the American Business Credit Corporation; that in accordance with the proposal made by the said Bentson for the surrender of his stock he was motivated by the cessation of hostilities in World War II, and was under apprehension that the profits and earnings of the said Oregon Motor Stages would be curtailed and that the dividend policy which he anticipated would have partially provided funds for the liquidation of

his said note would be discontinued. His proposal contained the following statement:

“My object in desiring to dispose of this stock is that the sudden end of the war has made a great difference in my plans, and on this account I desire to be relieved of my obligation to the said American Business Credit Corporation.”

(j) That the value of petitioners' stock in said Oregon Motor Stages was not enhanced in value by the surrender of the stock of the said Bentson, but the value thereof was, in fact, depreciated by the surrender of said stock by the said Bentson and the distribution of the corporation's cash to him, and the company's operations were curtailed thereby.

(k) The cancellation or redemption or purchase by Oregon Motor Stages was of all the stock of a particular stockholder, Mr. Bentson, and he thereafter ceased to be interested in the affairs of the corporation and neither Mr. Bentson nor any other member of the said group retained any beneficial or other interest in said stock thereafter. Neither Mr. Bentson nor any other member of the said group realized any economic, taxable or other gain of any character from the transaction. There was no pro-rata or any other type of distribution from the corporation to the stockholders.

(l) That the payment of interest and attorneys fees by Oregon Motor Stages was in payment of obligations of the company and did not in any sense represent a taxable distribution to or on behalf of petitioners.

Wherefore, petitioners pray that the Court may

hear and determine this their appeal and that it declare petitioners' return for 1945 was correct and that there is no deficiency in tax and/or penalty for said year 1945.

/s/ GARTHE BROWN,
Counsel for Petitioners.

Of Counsel:

Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department
Office of the Regional Commissioner
Internal Revenue Service
1112 Cascade Building
Portland 4, Oregon

Sep. 28, 1953

In Replying Refer To: ARC-Ap:SF Port:VEV:
90D.

Mr. Robert T. Jacob
Mrs. Agnes C. Jacob
917 Public Service Building
Portland 4, Oregon

Dear Mr. and Mrs. Jacob:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1945, discloses a deficiency in the amount of \$66,977.56 and \$4,035.66 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner,

/s/ By A. N. Williams,

Associate Chief, Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form 870

STATEMENT

Mr. Robert T. Jacob and Mrs. Agnes C. Jacob
 Husband and Wife
 917 Public Service Building
 Portland 4, Oregon

Income tax liability for the taxable year ended
 December 31, 1945.

Section 294(d) (2)		
Year	Deficiency	Penalty
1945	\$66,977.56	\$4,035.66

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 9, 1951, and to your protest dated September 4, 1951.

The 6% penalty for the substantial underestimate of estimated tax has been asserted in accordance with the provisions of Section 294(d)(2) of the Internal Revenue Code.

Taxable Year Ended December 31, 1945

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$ 16,586.72
Unallowable deductions and additional income:	
(a) Dividends (Oregon Motor Stages) ..	\$87,500.00
(b) Additional distribution (Oregon Motor Stages)	2,076.20
	89,576.20
Total	\$106,162.92
Non-taxable income and additional deductions:	
(c) Interest expense	1,869.86
Net income adjusted.....	\$104,293.06

Explanation of Adjustments

(a) The records of this office show that prior to

July 2, 1945, you, E. Royce, B. Royce, Fred C. Niederkrome and A. L. Schneider negotiated for the purchase of the capital stock of Oregon Motor Stages, Portland, Oregon, an Oregon corporation engaged in the business of bus transportation. The outstanding stock of that corporation then consisted of 750 common shares, with a par value of \$100.00 per share.

As a result of the negotiations referred to above, on or about July 2, 1945, you and your associates purchased shares of Oregon Motor Stages in the number and at the cost shown below:

	Shares	Cost
E. Royce	145	\$145,000.00
B. Royce	50	50,000.00
Robert T. Jacob.....	100	100,000.00
Fred C. Niederkrome.....	55	55,000.00
A. L. Schneider.....	50	50,000.00
 Total	 400	 \$400,000.00

In accordance with the plan adopted, the remaining 350 shares of Oregon Motor Stages stock were acquired in the name of L. R. Bentson, 411 E. 15th Street, North Vancouver, B. C., an uncle of E. Royce and B. Royce, in consideration of payment of \$350,000 cash. Such payment was made from the proceeds of a loan obtained by E. Royce acting for you, himself and your above-named associates, through the Portland Branch of the American Business Credit Corporation, New York City, on a 90-day note which was signed by E. Royce and L. R. Bentson and which was collateralized by deposit of

the entire 750 shares of stock of Oregon Motor Stages.

On or about September 6, 1945, pursuant to the plan adopted by you and your associates, as aforesaid, Oregon Motor Stages acquired the 350 shares of its own stock then standing in the name of L. R. Bentson and issued its check to him in the sum of \$350,000.00. This check was immediately endorsed and delivered to the American Business Credit Corporation in satisfaction of the 90-day note signed by E. Royce and L. R. Bentson.

It has been determined that it was not intended that L. R. Bentson should acquire, nor did he at any time acquire, any bona fide or actual beneficial interest in the stock of Oregon Motor Stages.

It has been further determined that the accumulated earnings and profits of Oregon Motor Stages available for distribution as dividends during the year 1945 was in excess of \$350,000.00.

This office holds that the transaction whereby Oregon Motor Stages acquired 350 shares of its capital stock, which were issued in the name of L. R. Bentson, for the sum of \$350,000.00, was consummated at such a time and in such a manner as to result in the realization of taxable income to you in the amount of \$87,500.00, such sum being that portion of the total sum of \$350,000.00 which 100 shares of stock of Oregon Motor Stages owned by you bears to the total of 400 shares of such stock owned by you, E. Royce, B. Royce, Fred C. Niederkrome and A. L. Schneider.

(b) It has been further determined that in con-

nection with the transaction whereby Oregon Motor Stages acquired 350 shares of its stock in the manner stated above, that corporation paid interest to the American Business Credit Corporation and attorney fees in the respective total amounts of \$8,054.80 and \$2,135.41. With respect to these sums, this office holds that to the extent of \$2,013.70 and \$62.50 respectively, the payment of interest and attorney fees was in satisfaction of your personal liability, incurred in connection with the transactions whereby you acquired the stock of Oregon Motor Stages. Your reported income has, therefore, been increased by \$2,076.20.

(c) It has been determined that of the amount of \$2,013.70 heretofore held under item (b) above to be taxable to you, the sum of \$1,869.86 is allowable as a deduction for interest paid in 1945.

Computation of Income Tax

Net income adjusted.....	\$104,293.06
Less: Excess of net long-term capital gain over short-term capital loss.....	639.76
Ordinary net income.....	\$103,653.30
Less: Normal tax exemption.....	500.00
Balance subject to normal tax.....	\$103,153.30
Normal tax—3% of \$103,153.30.....	3,094.60
Ordinary net income.....	\$103,653.30
Less: Surtax exemptions.....	2,500.00
Balance subject to surtax.....	\$101,153.30
Surtax	68,346.44
Partial tax	\$ 71,441.04
Plus: 50% of \$639.76.....	319.88
Income tax liability.....	\$ 71,760.92

Computation of Income Tax—(Continued)

Income tax liability disclosed by return,		
Account No. 3011423.....		4,783.36
		<hr/>
Deficiency in income tax.....	\$	66,977.56
		<hr/>
Penalty, Sec. 294(d) (2), Internal Revenue Code		
Income tax liability as adjusted.....	\$	71,760.92
Less: Withholding tax.....	None	
Paid on Estimated declaration	\$4,500.00	4,500.00
		<hr/>
Difference	\$	67,260.92
Penalty (6% of \$67,260.92).....		4,035.66
		<hr/>

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51531.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.
3. Admits the allegations contained in paragraph III of the petition.
4. Denies that he erred in his determination of the deficiency in income tax and penalty as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5. (a) Admits the allegations contained in paragraph V(a) of the petition, except that it is denied that taxpayers were entitled to three additional exemptions by reason of dependency.

(b) Admits the allegations contained in paragraph V(b) of the petition.

(c) Denies the allegations contained in paragraph V(c) of the petition.

(d) Denies the allegations contained in paragraph V(d) of the petition. Alleges that the nature of the stock transaction including the acquisition, payment and disposition of the remaining 350 shares of Oregon Motor Stages stock was as explained on pages 1 to 3, inclusive, of Exhibit A attached to the petition on file in this proceeding.

(e) to (l), inclusive. Denies the allegations contained in Paragraph V(e) to (l), inclusive, of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of the deficiency and penalty be approved.

/s/ DANIEL A. TAYLOR, WHP

Chief Counsel, Internal Revenue
Service.

Of Counsel: Wilford H. Payne, Associate Appellate
Counsel, John D. Picco, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 23, 1954.

[Title of Tax Court and Docket No. 51533.]

PETITION

The above named petitioners hereby petition the above entitled Court for a redetermination of the deficiency set forth by the respondent in his Notice of Deficiency dated the 28th day of September, 1953, and as a basis for this proceeding alleges as follows:

I.

Petitioners are husband and wife residing near Clackamas, Clackamas County, State of Oregon, and filed their Federal income tax returns for the years involved herein with the Collector of Internal Revenue for the District of Oregon at Portland, Oregon.

II.

The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioners from Portland, Oregon, under date of September 28, 1953.

III.

The within controversy involves an asserted deficiency in Federal income taxes and penalty for the years and in the amounts as set forth in the following schedule:

		Sec. 294(d) (2)
Year	Deficiency	Penalty
1945	\$21,157.87	\$1,102.38
1948	2,348.28	
1949	722.40	
Totals	<u>\$24,228.55</u>	<u>\$1,102.38</u>

IV.

In arriving at his conclusions as set forth in said Notice of Deficiency the respondent committed the following errors:

A. As to the calendar year 1945:

1. The respondent erred in including in petitioners' income the sum of \$43,750.00, or any sum whatsoever, as alleged dividends from Oregon Motor Stages.

2. The respondent further erred in including in petitioners' income the sum of \$1,038.10, or any sum whatsoever, as an additional distribution from the Oregon Motor Stages.

3. Respondent further erred in asserting a penalty of \$1,102.38, or any sum whatsoever, under the provisions of Section 294(d)(2), or under any other section, of Internal Revenue Code.

B. As to the calendar year 1948:

1. The respondent erred in including in petitioners' income the sum of \$700.00, or any sum whatsoever, as additional capital gains.

2. The respondent further erred in including in petitioners' income the sum of \$9,182.40, or any sum whatsoever, as income from the receipt of shares of the capital stock of Alder Gold-Copper Company.

C. As to the calendar year 1949:

1. The respondent erred in including in petitioners' income the sum of \$1,909.13, or any sum what-

soever, as income from the receipt of shares of the capital stock of Alder Gold-Copper Company.

V.

The facts upon which petitioners rely as a basis for this proceeding are as follows:

a. During all of the years in question, petitioners were husband and wife living together and they are entitled to credit for three additional dependents.

b. During the year 1945, petitioner, Albert L. Schneider, and a number of associates entered into negotiation with the then stockholders of Oregon Motor Stages for the acquisition of all of the capital stock of said corporation. There were outstanding at that time 750 shares of stock of said company and the price upon which negotiations were based was \$1,000.00 per share. Petitioner, Albert L. Schneider, E. Royce, B. Royce, F. C. Niederkrome and R. T. Jacob began preparations for the acquisition of said stock, but Mr. L. R. Bentson of Vancouver, B. C., who was a relative of E. Royce and B. Royce, informed the group that he desired to acquire a portion of the stock and agreed to and did purchase 350 shares of its stock.

In the acquisition of his stock, Mr. Bentson advised the group that his funds were in Canada and were blocked, and it would be necessary for him to make arrangements to finance his purchase. Accordingly, a loan was negotiated on his behalf with the American Business Credit Corporation. In the transaction, I loaned my stock as an accommodation

to be pledged with Bentson's stock as security for said loan, but I did not participate in the negotiation of said loan and had no obligation whatsoever for its repayment.

After the conclusion of World War II in August, 1945, Mr. Bentson became apprehensive that the earnings of the corporation would be drastically curtailed and that the investment would not prove as profitable in the matter of liquidating his obligation as he had anticipated at the time of its purchase and, therefore, made an offer to the corporation to surrender his 350 shares of stock upon the corporation paying the interest on his obligation and liquidating the loan from American Business Credit Corporation. Upon the surrender of his shares of stock Oregon Motor Stages issued to him a check for the sum of \$350,000.00, which said check the said Bentson delivered to American Business Credit Corporation in payment of his said loan.

Neither petitioner, Albert L. Schneider, nor Bertha Schneider, received any part of said payment, either directly, indirectly, or constructively, nor did they receive any benefit directly or indirectly from the payment of said sum to the said Bentson.

c. The facts as set forth in paragraph b. above apply with equal force and effect to the item of \$1,038.10, included by the respondent in petitioners' income as an "additional distribution" (Oregon Motor Stages).

d. As to the "other income" alleged by the re-

spondent to have been received by me in the years 1948 and 1949 on account of common shares of the Alder Gold-Copper Company which was alleged to have a fair market value of 10c for the year 1948 and 0.97614c per share in the year 1949, this stock had no fair market value or other value whatsoever, at any time during the years of its receipt. The company has operated consistently at heavy losses and there was not a general market for said stock.

e. As to the alleged capital gain, the stock in question was acquired by petitioners in the year 1946 for the sum of \$3,000.00 and sold in the year 1948 for the sum of \$4,000.00, resulting in a net gain of \$1,000.00, 50% of which was reportable for Federal tax purposes and this amount was reported in the original return.

f. On petitioners' estimated tax for the year 1945, the full amount of tax estimated to be due and owing was reported, and accordingly the penalty proposed is without foundation.

Wherefore, petitioners pray that the Court hear and determine their appeal and that it declare that the respondent committed the errors assigned herein and that he erroneously increased petitioners' income and erroneously asserted deficiencies against petitioners for said years.

/s/ R. T. JACOB,

Counsel for Petitioners.

Of Counsel:

Jacob, Jones & Brown.

Duly Verified.

EXHIBIT "A"

Regional
1112 Cascade Building
Portland 4, Oregon

Sep. 28, 1953

ARC-Ap:SF
Port:VEV:90D

Mr. Albert L. Schneider
Mrs. Bertha Schneider
Route 1, Box 235
Clackamas, Oregon

Dear Mr. and Mrs. Schneider:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1945, 1948 and 1949, discloses deficiencies in the total amount of \$24,228.55 and a penalty of \$1,102.38 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal

holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1112 Cascade Building, Portland 4, Oregon. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner,

/s/ By A. N. Williams,
Associate Chief, Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form 870

VEVlene la

STATEMENT

Mr. Albert L. Schneider and Mrs. Bertha Schneider
Husband and Wife
Route 1, Box 235
Clackamas, Oregon

Income tax liability for the taxable years ended
December 31, 1945, 1948 and 1949.

		Sec. 294(d)(2)
Year	Deficiency	Penalty
1945	\$21,157.87	\$1,102.38
1948	2,348.28	
1949	722.40	
Totals		\$1,102.38

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 7, 1951, and to your protest dated August 22, 1951.

The 6% penalty for the substantial underestimate of estimated tax has been asserted for the taxable year ended December 31, 1945, in accordance with the provisions of Section 294(d)(2) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Robert T. Jacob, 917 Public Service Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1945		
Adjustments to Net Income		
Net loss as disclosed by return, Form 1040.....		\$(2,070.58)
Unallowable deductions and additional income:		
(a) Dividends (Oregon Motor Stages) ..	\$43,750.00	
(b) Additional distribution (Oregon Motor Stages)	1,038.10	
(c) Capital gains	936.67	45,724.77
Total		\$43,654.19
Non-taxable income and additional deductions:		
(d) Interest		\$ 934.93
Net income as adjusted.....		\$42,719.26

Explanation of Adjustments

(a) The records of this office show that prior to July 2, 1945, you, E. Royce, B. Royce, Robert T. Jacob and Fred C. Niederkrome negotiated for the purchase of the capital stock of Oregon Motor Stages, Portland, Oregon, an Oregon corporation engaged in the business of bus transportation. The outstanding stock of that corporation then consisted of 750 common shares, with a par value of \$100.00 per share.

As a result of the negotiations referred to above, on or about July 2, 1945, you and your associates purchased shares of Oregon Motor Stages in the number and at the cost shown below:

	Shares	Cost
E. Royce	145	\$145,000.00
B. Royce	50	50,000.00
Robert T. Jacob.....	100	100,000.00
Fred C. Niederkrome.....	55	55,000.00
A. L. Schneider.....	50	50,000.00
<hr/>		<hr/>
Total	400	\$400,000.00

In accordance with the plan adopted, the remaining 350 shares of Oregon Motor Stages stock were acquired in the name of L. R. Bentson, 411 E. 15th Street, North Vancouver, B. C., an uncle of B. Royce and E. Royce, in consideration of payment of \$350,000.00 cash. Such payment was made from the proceeds of a loan obtained by E. Royce acting for you, himself and your above-named associates, through the Portland Branch of the American Business Credit Corporation, New York City, on a 90-day note which was signed by E. Royce and

L. R. Bentson, and which was collateralized by deposit of the entire 750 shares of stock of Oregon Motor Stages.

On or about September 6, 1945, pursuant to the plan adopted by you and your associates, as aforesaid, Oregon Motor Stages acquired the 350 shares of its own stock then standing in the name of L. R. Bentson and issued its check to him in the sum of \$350,000.00. This check was immediately endorsed and delivered to the American Business Credit Corporation in satisfaction of the 90-day note signed by E. Royce and L. R. Bentson.

It has been determined that it was not intended that L. R. Bentson should acquire, nor did he at any time acquire, any bona fide or actual beneficial interest in the stock of Oregon Motor Stages.

It has been further determined that the accumulated earnings and profits of Oregon Motor Stages available for distribution as dividends during the year 1945 were in excess of \$350,000.00.

This office holds that the transaction whereby Oregon Motor Stages acquired 350 shares of its capital stock, which were issued in the name of L. R. Bentson, for the sum of \$350,000.00, was consummated at such a time and in such a manner as to result in the realization of taxable income to you in the amount of \$43,750.00, such sum being that portion of the total sum of \$350,000.00 which 50 shares of stock of Oregon Motor Stages owned by you bears to the total of 400 shares of such stock owned by you, E. Royce, B. Royce, Robert T. Jacob and Fred C. Niederkrome.

(b) It has been further determined that in connection with the transaction whereby Oregon Motor Stages acquired 350 shares of its stock in the manner stated above, that corporation paid interest to the American Business Credit Corporation and attorney fees in the respective total amounts of \$8,054.80 and \$2,135.41. With respect to these sums, this office holds that to the extent of \$1,006.85 and \$31.25, respectively, payment of interest and attorney fees was in satisfaction of your personal liability incurred in connection with the transaction whereby you acquired the stock of Oregon Motor Stages. Your reported income has, therefore, been increased by \$1,038.10.

(c) In your return filed for the calendar year 1945, you claimed the cost of 800 shares of Missouri Pacific stock and 2100 shares of Chicago, Rock Island and Pacific stock, in the respective amounts of \$400.00 and \$1,050.00, as a loss from worthless stock. It has been determined that this stock did not become worthless in the calendar year 1945 and that it was sold and a gain reported from such sale in the income tax return filed by Albert L. Schneider for the year 1946. It has been further determined that in the calendar year 1945, you had a net short-term capital gain from the sale or exchange of capital assets in the amount of \$405.99, rather than a net capital loss of \$530.68 as reported in your return. Your net income has, therefore, been increased by the amount of \$936.67.

(d) It has been determined that of the amount of \$1,038.10, held under item (b) above to be tax-

able to you, the sum of \$934.93 is allowable as a deduction for interest paid in 1945.

Computation of Income Tax

Net income adjusted.....	\$42,719.26	
Less: Normal tax exemption.....	500.00	
		<hr/>
Balance subject to normal tax.....	\$42,219.26	
Normal tax 3% of \$42,219.26.....	1,266.58	
Net income adjusted.....	\$42,719.26	
Less: Surtax exemptions.....	2,500.00	
		<hr/>
Balance subject to surtax.....	\$40,219.26	
Surtax	\$19,891.29	
		<hr/>
Income tax liability.....	\$21,157.87	
Income tax liability disclosed by return, Account No. 7900027.....	None	
		<hr/>
Deficiency in income tax.....	\$21,157.87	
		<hr/>
Penalty, Section 294(d) (2) Internal Revenue Code		
Income tax liability adjusted.....	\$21,157.87	
Less: Withholding tax	\$ 912.00	
Paid on estimated declaration.....	1,872.95	2,784.95
		<hr/>
Difference	\$18,372.92	
		<hr/>
Penalty (6% of \$18,372.92).....	\$ 1,102.38	
		<hr/>

Taxable Year Ended December 31, 1948

Adjustments to Net Income

Net income as disclosed by return, Form 1040.....	\$ 8,637.29	
Unallowable deductions and additional income:		
(a) Capital gains	\$ 700.00	
(b) Other income	9,182.40	9,882.40
		<hr/>
Net income adjusted.....	\$18,519.69	

Explanation of Adjustments

(a) In your return filed for the calendar year

1948, you reported a long-term capital gain from the sale of Bus Sales Agency stock in the amount of \$1,000.00, of which 50% or \$500.00 was taken into account under the provisions of Section 117(b) of the Internal Revenue Code. It has been determined that the sales price of such stock was \$4,000.00, that the cost basis was in the amount of \$2,000.00 rather than \$3,000.00 as reported, and that you realized a gain from the sale in the amount of \$2,000.00, of which 50% or \$1,000.00 is taken into account. Your reported gain from such sale has accordingly been increased by the amount of \$500.00.

It has been further determined that the commission of \$200.00 paid in the year 1948 upon the sale of an airplane in 1947 and claimed as a short-term capital loss in your return filed for the calendar year 1948 is unallowable, such commission having been claimed as a deduction in computing the loss from the sale of such airplane, which was reported in the return filed by Albert L. Schneider for the calendar year 1947.

Your reported net capital gains have accordingly been increased by the amount of \$700.00.

(b) The records of this office show that during the calendar year 1948 you received 91,824 shares of the common stock of Alder Gold-Copper Company, having a fair market value of \$.10 per share, as compensation for services rendered by Albert L. Schneider. In your return filed for the calendar year 1948, you reported no income from this source.

It is held that the receipt of such stock constitutes taxable income to you, and your reported net income for the calendar year 1948 is therefore increased by the amount of \$9,182.40.

Computation of Income Tax

Net income adjusted.....	\$18,519.69	
Less: Exemptions (4x\$600.00).....	2,400.00	
		<hr/>
Income subject to tentative tax.....	\$16,119.69	
One-half of such income if joint return.....	8,059.85	
Tentative tax		\$ 1,980.35
Tax reduction: \$400.00 @ 17%.....	\$ 68.00	
\$1,580.35 @ 12%.....	189.64	257.64
		<hr/>
Combined normal tax and surtax.....		\$ 1,722.71
Income tax liability—\$1,722.71x2.....		3,445.42
Income tax liability disclosed by return, Account No. 300510.....		1,097.14
		<hr/>
Deficiency in income tax.....		\$ 2,348.28
		<hr/>

Taxable Year Ended December 31, 1949

Adjustments to Net Income

Net income as disclosed by return.....	\$26,536.81
Unallowable deductions and additional income:	
(a) Other income	1,909.13
	<hr/>
Net income adjusted.....	\$28,445.94

Explanation of Adjustments

(a) The records of this office show that during the calendar year 1949, you received 19558 shares of the common stock of the Alder Gold-Copper Company, having a fair market value of \$0.97614 per share, as compensation for services rendered by Albert L. Schneider. In your return for the calen-

dar year 1949 you reported no income from this source. It is held that the receipt of such stock constitutes taxable income to you, and your reported net income for the calendar year 1949 is therefore increased by the amount of \$1,909.13.

Computation of Income Tax

Net income adjusted.....	\$28,445.94	
Less: Exemptions (4x600.00).....	2,400.00	
<hr/>		
Income subject to tentative tax.....	\$26,045.94	
One-half of such income if joint return.....	13,022.97	
Tentative tax		\$ 3,839.88
Tax reduction: \$400.00 @ 17%.....	\$ 68.00	
\$3,439.88 @ 12%.....	412.79	480.79
<hr/>		
Combined normal tax and surtax.....		\$ 3,359.09
Income tax liability—\$3,359.09x2		6,718.18
Income tax liability disclosed by return, Account No. 32719102.....		5,995.78
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Deficiency in income tax.....	\$	722.40
<hr/>		

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51533.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.

It is held that the receipt of such stock constitutes taxable income to you, and your reported net income for the calendar year 1948 is therefore increased by the amount of \$9,182.40.

Computation of Income Tax

Net income adjusted.....	\$18,519.69	
Less: Exemptions (4x\$600.00).....	2,400.00	
<hr/>		
Income subject to tentative tax.....	\$16,119.69	
One-half of such income if joint return.....	8,059.85	
Tentative tax		\$ 1,980.35
Tax reduction: \$400.00 @ 17%.....	\$ 68.00	
\$1,580.35 @ 12%.....	189.64	257.64
<hr/>		
Combined normal tax and surtax.....		\$ 1,722.71
Income tax liability—\$1,722.71x2.....		3,445.42
Income tax liability disclosed by return, Account No. 300510.....		1,097.14
<hr/>		
Deficiency in income tax.....		\$ 2,348.28
<hr/> <hr/>		

Taxable Year Ended December 31, 1949

Adjustments to Net Income

Net income as disclosed by return.....	\$26,536.81
Unallowable deductions and additional income:	
(a) Other income	1,909.13
<hr/>	
Net income adjusted.....	\$28,445.94

Explanation of Adjustments

(a) The records of this office show that during the calendar year 1949, you received 19558 shares of the common stock of the Alder Gold-Copper Company, having a fair market value of \$0.97614 per share, as compensation for services rendered by Albert L. Schneider. In your return for the calen-

dar year 1949 you reported no income from this source. It is held that the receipt of such stock constitutes taxable income to you, and your reported net income for the calendar year 1949 is therefore increased by the amount of \$1,909.13.

Computation of Income Tax

Net income adjusted.....	\$28,445.94	
Less: Exemptions (4x600.00).....	2,400.00	
<hr/>		
Income subject to tentative tax.....	\$26,045.94	
One-half of such income if joint return.....	13,022.97	
Tentative tax		\$ 3,839.88
Tax reduction: \$400.00 @ 17%.....	\$ 68.00	
\$3,439.88 @ 12%.....	412.79	480.79
<hr/>		
Combined normal tax and surtax.....		\$ 3,359.09
Income tax liability—\$3,359.09x2		6,718.18
Income tax liability disclosed by return, Account No. 32719102.....		5,995.78
<hr/>		
Deficiency in income tax.....	\$	722.40
<hr/> <hr/>		

[Endorsed]: T.C.U.S. Filed Dec. 21, 1953.

[Title of Tax Court and Docket No. 51533.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.

3. Admits the allegations contained in paragraph III of the petition.

4. Denies that he erred in his determination of the deficiencies in income tax and penalty as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition.

5. (a) Admits the allegations contained in paragraph V(a) of the petition, except that it is denied that the petitioners are entitled to credit for three additional dependents.

(b) Admits the allegations contained in the first two sentences of paragraph V(b) of the petition. Denies the remaining allegations contained in paragraph V(b) of the petition. Alleges that the nature of the stock transaction including the acquisition, payment and disposition of the remaining 350 shares of Oregon Motor Stages stock was as explained on pages 2 and 3 of Exhibit A attached to the petition on file in this proceeding.

(c), (d), (e) and (f) Denies the allegations contained in paragraph V(c), (d), (e) and (f) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's deter-

mination of the deficiencies and penalty be approved.

/s/ DANIEL A. TAYLOR, WHP

Chief Counsel, Internal Revenue
Service.

Of Counsel: Wilford H. Payne, Associate Appellate
Counsel, John D. Picco, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Feb. 23, 1954.

[Title of Tax Court and Docket Nos. 51491, 51526-
29, 51531, 51533.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties above named, appearing and acting by and through their respective counsel of record, as follows:

* * * * *

11. In order to finance the purchase of the 350 shares transferred to L. R. Bentson, a loan application for that amount of money was made to American Business Credit Corporation, an Oregon corporation, which corporation submitted it to its parent company, American Business Credit Corporation, a Delaware corporation, for approval. Exhibit A, not attached hereto but identified by the initials of attorneys, John Picco and Randall S. Jones, is a photostat copy of the minutes of a meeting of the Executive Committee of the American Business Credit Corporation, the Delaware corporation, held on June 20, 1945, certified by the treasurer and assistant secretary of said corporation, as shown in

the certification attached thereto, at which meeting said loan application was considered and acted upon.

12. The said application for a loan of \$350,000.00 was approved by the parent company and the loan was granted by the Portland branch of the American Business Credit Corporation. Exhibit 1 attached hereto is the note dated July 2, 1945, given in consideration for said loan.

13. The petitioners, Niederkrome, E. Royce, B. Royce, Jacob and Schneider, each permitted the shares of Oregon Motor Stages they had purchased to be used as collateral for said loan of \$350,000.00. Exhibits 2, 3, 4, 5 and 6 are receipts signed by L. R. Bentson for the certificates representing the shares of said petitioners.

14. Exhibit B attached hereto is a photostat copy of the check dated July 2, 1945, made payable to L. R. Bentson and E. Royce, written by American Business Credit Corporation for \$350,000.00 by which said loan was made, which check was used to purchase cashier's checks as per Exhibit 7.

15. Exhibit 7 is an application for cashier's checks purchased by L. R. Bentson, and Exhibit 8 is an application for cashier's checks purchased by petitioners, E. Royce, B. Royce, Niederkrome and Jacob.

* * * * *

18. Pursuant to the resolution last mentioned the corporation purchased and retired said 350 shares of capital stock, and issued its check dated September 6, 1945, payable to L. R. Bentson, for \$350,000.00. This check was endorsed by L. R. Bentson

and delivered to American Business Credit Corporation in payment of its above-mentioned loan in said amount. Attached hereto, marked Exhibit 10, is a photostatic copy of said check.

* * * * *

22. On or about June 20, 1946 the petitioner Niederkrome sold and transferred his stock in the corporation to the petitioner Schneider, because the Interstate Commerce Commission took the position that he could not be on the boards of two interstate carriers and that he should give up his interest in Oregon Motor Stages.

23. A special meeting of the Board of Directors of the corporation was held in Portland, Oregon, on July 9, 1946. Except for formal beginning and ending, the following is a copy of the minutes of said meeting:

“The following Directors were present: E. Royce, F. C. Niederkrome and Robt. T. Jacob.

The meeting was called to order by the President who stated that it had been called for the purpose of acting upon the resignation of F. C. Niederkrome as Director and Treasurer. Mr. Niederkrome advised that he had disposed of his stock in the company to Mr. A. L. Schneider, and that he was submitting his resignation in writing, which resignation was dated June 20, 1946. After a discussion of the matter, upon motion duly made and seconded, the resignation of Mr. Niederkrome as Director and Treasurer of the company was accepted and ordered filed of record.

The chair then announced that nominations for a

new Director were in order. Upon motion duly made and seconded, A. L. Schneider was thereupon elected as Director to serve until the next annual meeting or until his successor is appointed."

24. The petitioner Niederkrome has not been a stockholder, officer or director of the corporation since June 20, 1946. From the time the petitioners, E. Royce, B. Royce, Jacob and Schneider acquired their stock to the present time, they have continued to be stockholders of the corporation, and for several years beginning July 2, 1945, E. Royce and Jacob were officers and directors of the corporation. The petitioner, B. Royce, has never been either an officer or director of the corporation. Schneider was an officer and/or director for several years beginning March 11, 1946.

25. On July 19, 1945 Oregon Motor Stages issued its check, No. 7-60, in the amount of \$4,315.07 which is made payable to George W. Davidson, the then Vice-President and General Manager of the American Business Credit Corporation, Portland. George W. Davidson is now deceased. The amount of \$4,315.07 was charged on the books of the corporation to account No. 4620 and represented the finance servicing fee charged by Davidson on the aforesaid loan of \$350,000.00. Attached hereto as Exhibit C is an invoice dated July 17, 1945 relating to said finance servicing fee. On September 17, 1945 Oregon Motor Stages issued its check in the amount of \$3,739.73 which was made payable to the American Business Credit Corporation, Portland, for interest due and owing on the aforesaid loan of \$350,-

000.00. Attached hereto as Exhibits D and E are photostat copies of page 549 (dated July 20, 1945) and page 595 (dated September 17, 1945) of the cash receipts report of the American Business Credit Corporation showing the receipt by that corporation of the amounts of \$4,315.07 and \$3,739.73. Also attached hereto as Exhibits F and G are the bank statement of American Business Credit Corporation (in account with the U. S. National Bank for the month of September 1945) and an account entitled "Royce and Bentson" on the ledger sheet of American Business Credit Corporation reflecting the entries relating to the aforesaid loan of \$350,000.00, and the payment of said loan together with the interest and finance servicing fee.

* * * * *

EXHIBITS

All the exhibits herein mentioned, except Exhibit A, may be offered and received in evidence at the trial of the above entitled cases without further identification or authentication; subject, however, to such objections as counsel makes thereto at the trial on the ground of competency, relevancy, or materiality. All said exhibits (except Exhibit A) shall be considered as having been offered and received in evidence in these cases unless objection is made thereto and the objection is sustained.

Exhibit A is not attached hereto. Said exhibit may be offered in evidence at the trial of the above entitled cases without further identification or authentication, subject, however, to any and all other

objections as counsel may make thereto at the trial of said cases.

Additional Evidence

Each of the parties hereto reserves the right to supplement the facts herein set forth with evidence at the trial.

/s/ RANDALL S. JONES,
Counsel for Petitioners.

/s/ JOHN P. BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed May 14, 1955.

[Title of Tax Court and Docket Nos. 51526-7.]

SUPPLEMENTAL STIPULATION OF FACTS

The following supplemental stipulation of facts was entered into by and between the parties hereto, by their respective attorneys of record, on May 20, 1955, in lieu of a deposition which originally was to be taken pursuant to permission granted by Judge Ernest H. VanFossan of The Tax Court of the United States on May 16, 1955 in Portland, Oregon at the conclusion of the hearing of Ezra Royce, et al vs. Commissioner of Internal Revenue, Docket Nos. 51491, 51526, 51527, 51528, 51529, 51531 and 51533. The facts stipulated below are true and the same may be so considered and accepted by the Court as offered in evidence by the parties:

1. Copy of agreement executed January 11, 1947

by the petitioner E. Royce and certain individuals, namely, Roy K. Magney and Harvey F. Stone, is attached hereto and made a part hereof as Exhibit 45-SSSS.

2. Copy of escrow agreement executed March 18, 1947 by the petitioner E. Royce, Harvey F. Stone and Roy K. Magney is attached hereto and made a part hereof as Exhibit 46-TTTT.

3. Copy of statement of receipt and distribution of common stock of Alder Gold-Copper Company by E. Royce, trustee, certified to by Roy K. Magney, secretary of Alder Gold-Copper Company, is attached hereto and made a part hereof as Exhibit 47-UUUU.

4. No shares of the common stock of Alder Gold-Copper Company were received by the petitioner E. Royce during 1947 and 1948, and the petitioner E. Royce realized no income in respect thereof in said years.

5. In 1949 the petitioner E. Royce received 134,148 shares of the common stock of Alder Gold-Copper Company as compensation for services rendered in connection with the agreements attached hereto as Exhibits 45-SSSS and 46-TTTT. The shares of common stock of Alder Gold-Copper Company received by the petitioner E. Royce in 1949 had a fair market value in that year of \$0.07½ per share or a total value of \$10,061.10. The receipt of this stock by the petitioner E. Royce constituted taxable income to him in 1949 and is to be included by him as ordinary income for that year.

6. The petition filed in Docket No. 51526 may

be amended in such manner as may be necessary to conform to the proof in the light of this supplemental stipulation of facts.

/s/ RANDALL S. JONES,
Attorney for Petitioners.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Attorney
for Respondent.

[Endorsed]: T.C.U.S. Filed June 1, 1955.

T. C. Memo. 1956-255

Tax Court of the United States

Fred C. Niederkrome, et al.,* Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket Nos. 51491, 51526, 51527, 51528, 51529, 51531, 51533. Filed November 16, 1956.

MEMORANDUM FINDINGS OF FACT AND OPINION

1. Held, L. R. Bentson was not a bona fide participant in the transactions leading up to the acquisition by petitioners of the stock of Oregon Motor Stages and was not a bona fide stockholder in such

* Proceedings of the following petitioners are consolidated herewith: E. Royce and Dora F. Royce, Docket No. 51526; Ezra Royce, Docket No. 51527; B. Royce, Docket No. 51528; Estate of Isabelle H. Royce, Deceased, B. Royce, Executor, Docket No. 51529; Robert T. Jacob and Agnes C. Jacob, Docket No. 51531; and Albert L. Schneider and Bertha Schneider, Docket No. 51533.

company. Held, further, for failure of proof of error, respondent's determination that the corporate distributions by Oregon Motor Stages, in retirement of 350 shares of its stock issued in the name of L. R. Bentson and in payment of certain incidental expenses, were made at a time or under such circumstances as to be essentially equivalent to dividends taxable to petitioners, is approved.

2. Payments by Burnside Realty, Inc., during the years 1944 through 1949, under a certain lease agreement with option to purchase held not to constitute taxable income to E. Royce.

3. Held, the sum of \$20,000 withdrawn by E. Royce in 1945 from Hippodrome Amusement Company was not received by him as a loan.

4. Held, Dora F. Royce was not a bona fide partner, for tax purposes, of the Yellow Cab Company of Portland during the years 1944 through 1947 and of the Yellow Cab Company of Seattle during the years 1945 through 1947.

5. Held, Eunice M. Royce, or the trust of which she was beneficiary, was not, during the years involved, a bona fide partner in the Yellow Cab Company of Seattle.

6. Held, the sales in 1947 by the Yellow Cab Company of Portland of used taxicabs were understated in the amount of \$4,525.

Randall S. Jones, Esq., for the petitioners.

John D. Picco, Esq., for the respondent.

Van Fossan, Judge: Respondent determined deficiencies in income tax of the petitioners for years and in amounts as follows:

Year	Deficiency	Addition to Tax under	
		Sec. 294(d) (2)	Sec. 293(b)
Fred C. Niederkrome, Docket No. 51491			
1945	\$ 32,348.48	\$ 1,940.07	
E. Royce and Dora F. Royce, Docket No. 51526			
1948	\$ 73,966.90		
1949	35,145.26		
Ezra Royce, Docket No. 51527			
1944	\$ 74,286.82		
1945	495,661.69	\$31,467.14	
1946	143,714.83		
1947	112,261.13	7,011.97	\$56,130.57
B. Royce, Docket No. 51528			
1945	\$ 20,399.28	\$ 2,005.84	
1947	8,421.34		
Estate of Isabelle H. Royce, Deceased, B. Royce, Executor, Docket No. 51529			
1945	\$ 31,913.80	\$ 2,588.89	
1946	11,435.22		
1947	8,421.36		
Robert T. Jacob and Agnes C. Jacob, Docket No. 51531			
1945	\$ 66,977.56	\$ 4,035.66	
Albert L. Schneider and Bertha Schneider, Docket No. 51533			
1945	\$ 21,157.87	\$ 1,102.38	
1948	2,348.28		
1949	722.40		

Three additional dockets initially involved in these proceedings have been settled by stipulations of the parties and decisions entered in accordance with such stipulations. The applicability of the additions to tax determined by respondent under section 294(d)(2), Internal Revenue Code of 1939, for substantial underestimate of tax is now conceded by the respective petitioners involved. Respondent abandons his determination of the so-

called fraud penalty for the year 1947 in Docket No. 51527 and concedes the inapplicability thereof to the petitioner therein. Various other issues raised in the pleadings have also been settled by stipulation and adjustments resulting therefrom will be reflected in the Rule 50 recomputations consequent herein.

Six issues remaining and submitted to the Court for decision are:

(1) Whether the disbursements by Oregon Motor Stages in 1945 from its surplus account, in retirement of 350 shares of its stock and in payment of certain incidental expenses, under circumstances here present, constituted distributions essentially equivalent to taxable dividends, within the scope of section 115(g), Internal Revenue Code of 1939, taxable to petitioners in Docket Nos. 51491, 51527, 51528, 51529, 51531 and 51533, or, in the alternative, to the petitioner in Docket No. 51527;

(2) Whether certain payments made by Burnside Realty, Inc., during the years 1944 to 1949, inclusive, constituted taxable income to petitioner in Docket No. 51527;

(3) Whether the disbursement of \$20,000 on December 28, 1945, from the Hippodrome Amusement Company was received by petitioner in Docket No. 51527 as a dividend or as a loan;

(4) Whether, during the years 1944 through 1947, the co-petitioner in Docket No. 51526, Dora F. Royce, was, for tax purposes, a bona fide member of the partnerships doing business as Yellow Cab Company of Portland and Yellow Cab Company of Seattle;

(5) Whether the minor daughter of petitioners in Docket No. 51526 and petitioner in Docket No. 51527, or the trust of which she was beneficiary, was, during the years 1945 through 1949, a bona fide member for tax purposes of the partnership doing business as Yellow Cab Company of Seattle;

(6) Whether the Yellow Cab Company of Portland, a partnership, understated its reported sales of used taxicabs for the year 1947, and, if so, the amount thereof.

General Findings of Fact

All stipulations of fact filed herein by the parties are adopted and, by this reference, made a part hereof.

The petitioner in Docket No. 51491 is Fred C. Niederkrome, who, during the taxable year 1945, was a resident of Portland, Oregon.

The petitioners in Docket No. 51526 are Ezra Royce and his wife, Dora F. Royce, who, during the years 1944 through 1949, resided in Portland, Oregon. Ezra Royce, sometimes called Roy Royce and who will hereinafter be referred to as E. Royce, is also the petitioner in Docket No. 51527.

B. Royce, who, during the years 1945 through 1947, was resident in Vancouver, Washington, is the petitioner in Docket No. 51528, and the estate of his deceased wife, Isabelle H. Royce, is the petitioner in Docket No. 51529.

The petitioners in Docket No. 51531 are Robert T. and Agnes C. Jacob, husband and wife, who, during 1945, the year involved therein, were residents of Portland, Oregon.

Albert L. Schneider and his wife, Bertha Schneider, are the petitioners in Docket No. 51533. During 1945, 1948 and 1949, the taxable years involved therein, Albert and Bertha resided in Clackamas County, Oregon.

For the years respectively involved in the aforementioned proceedings, all petitioners filed their individual or joint returns on a cash receipts and disbursements method of accounting and on a calendar year basis. In each case, such returns were filed with the then collector of internal revenue for the district of Oregon at Portland, except those returns involved in Dockets numbered 51528 and 51529, which returns were filed with the then collector of internal revenue for the district of Washington at Tacoma.

Issue 1.

Findings of Fact

The Oregon Motor Stages (hereinafter called Stages) was organized as an Oregon corporation in 1931, and in 1945 was the largest intrastate bus company operating in Oregon. Stages operated its motor busses as a public carrier pursuant to a permanent franchise under the rules and regulations of the Interstate Commerce Commission. In June, 1945, the issued and outstanding capital stock of Stages consisted of 750 shares of common stock owned as follows:

250 shares by L. D. Jones

250 shares by T. D. Wilson

250 shares by R. W. Lemon or members
of his family.

During April or May, 1945, Schneider, after contacting the stockholders of Stages, advised E. Royce that the stock of the corporation was for sale. Promptly thereafter, E. Royce and Jacob entered into discussions with various individuals and the stockholders in regard to the purchase of the stock based upon a price of \$1,000 per share. As a result of the negotiations, they and B. Royce, Niederkrome and Jacob expressed a willingness to purchase a total of 400 shares. Negotiations were conducted with other individuals concerning the purchase of the remaining 350 shares of the stock. They were financially able to acquire the shares but declined to participate in the venture. Consideration of giving Stages an option to purchase the 350 shares developed at that time to the point of drafting an agreement for that purpose. During the middle or latter part of June, 1945, L. R. Bentson visited Portland and was consulted about the venture.

Bentson, born in 1869, was an American citizen and resided in Canada after 1906. He was an uncle of E. Royce, B. Royce and Fannie Orsen, whom he visited about once a year during a stay of 4 or 5 days in Portland.

Bentson was not a man of expensive habits or a lavish spender. He and his wife lived modestly in a small house in Vancouver, B.C., which was valued at \$4,200 at the time of his death in April, 1950. He left an estate of \$33,673.06 to Fannie Orsen. He owned a house and garage in Vancouver, which he rented in 1945 for \$20 and \$12 per month,

respectively. Bentson invested small amounts of money in Canadian securities and made regular small deposits to his bank account, which, on August 14, 1945, aggregated \$6,539.42. What funds he had were said to be blocked by wartime restrictions in Canada.

Prior to June 20, 1945, application for loan of \$350,000 was made by E. Royce to American Business Credit Corporation, an Oregon corporation doing business in Portland, Oregon, (hereinafter sometimes called ABC-Portland). The application was duly submitted to the parent company, American Business Credit Corporation (hereinafter sometimes referred to as ABC-Delaware), a Delaware corporation, at its offices in New York City, for approval. ABC-Portland was dissolved or abandoned about 1949 and its records transferred to the main office of the parent company in New York. The application for loan of \$350,000 was considered by the Executive Committee of the parent company on June 20, 1945, the pertinent portion of the minutes of which committee reads as follows:

Mr. Davidson and Mr. Ebe then submitted an application on behalf of ABC-Portland. A group of outstanding individuals in Portland, headed by Messrs. Barney & Roy Royce and Robert Jacob, desire to purchase the entire capital stock of Oregon Motor Stages, largest intra-state bus company operating in Oregon. Capital stock consists in all of 750 shares Common, par value \$100.00 per share, book value \$537.00 per share. The stock is to be acquired for a price of \$750,000. The purchasers

intend to buy 400 shares for \$400,000, with their own funds. They ask that we extend a line of credit of \$350,000, the balance of the purchase price of the Oregon Motor Stages stock. We are asked to lend Mr. Roy Royce, personally, the sum of \$350,000, on his note, to be secured by all of the capital stock of Oregon Motor Stages. Our loan to be repaid in 90 days or adjusted as conditions warrant. Mr. R. Royce's personal statement reflects a net worth of \$1,366,000.00. Retiring stockholders will guarantee to R. Royce and his associates that the worth of Oregon Motor Stages is not less than the figure shown on the company's 4/30/45 statement. A fee of \$5,000 plus 5% per annum on cash for every 90 days is charge contemplated.

The Committee reviewed in detail the financial condition of Oregon Motor Stages as of 12/30/44 and 4/30/45 and its operating results for 1944. Mr. Davidson was questioned in respect to the proposed transaction and Mr. Dick's opinion was received. After consideration and full review, the Committee unanimously approved the credit line requested, subject to approval of counsel, and the sollowing [sic] stipulations:

1. Subject to unanimous approval of full Portland Committee.

The sale and purchase of the 750 shares of capital stock of Stages was consummated on July 2, 1945, at which time the former shareholders transferred 750 shares of stock in such manner that each of the petitioners next named and L. R. Bentson re-

ceived certificates for the number of shares indicated after their respective names:

Niederkrome	55
E. Royce	145
B. Royce	50
Robert T. Jacob	100
A. L. Schneider	50
L. R. Bentson	350
<hr/>	
Total	750

All of the certificates of stock received by the persons named above were immediately endorsed in blank and turned over to a representative of ABC to secure the loan from that company of \$350,000, Bentson giving his receipt to each of the others for their respective stock certificates, "such stock being loaned to me to be pledged to American Business Credit Corporation as collateral to loan this day made to me for the purchase of Three Hundred Fifty (350) shares of the common capital stock of said company." On the same date, July 2, 1945, ABC issued its check for \$350,000 payable to L. R. Bentson and E. Royce. The payees in turn executed a note dated July 2, 1945, in the amount of \$350,000, secured by all of the capital stock of Stages, and reading as follows:

\$350,000.00 Portland, Oregon, July 2, 1945.

On or before ninety (90) days after date, for value received, we, jointly and severally, promise to pay to the order of American Business Credit Corporation Three Hundred Fifty Thousand and

no/100 (\$350,000.00) Dollars, with interest from date hereof, payable monthly on the first day of each month hereafter, at the rate of 5 per cent per annum. Principal and interest payable in lawful money of the United States of America at the office of American Business Credit Corporation, Pacific Building, Portland, Oregon; and as collateral security for the payment of this note we, jointly and severally, herewith deposit and pledge with said American Business Credit Corporation 750 shares of the capital stock of Oregon Motor Stages, an Oregon corporation, evidenced by the following certificates: certificate 72 for 145 shares; certificate 73 for 100 shares; certificate 74 for 55 shares; certificate 75 for 50 shares; certificate 76 for 50 shares and certificate 77 for 350 shares; and we, jointly and severally, empower said American Business Credit Corporation, with option as to time and manner, to collect or sell and deliver all or any part of said capital stock and the certificates evidencing the same, with or without notice to us, or either of us, and to apply the proceeds thereof to the payment of this note with all interest due thereon, and to the payment of all expenses attending the sale or protesting of the said collateral; and in case the proceeds of the sale of said collateral shall not cover the principal, interest and expenses we, jointly and severally, promise to pay the deficiency forthwith after such sale; and in case suit or action is commenced to collect this note or any portion thereof, we, jointly and severally, promise to pay such additional sum as the court may ad-

judge reasonable as attorney's fees in any such suit or action.

/s/ L. R. Bentson

/s/ E. Royce

On July 17, 1945, George W. Davidson, manager of ABC-Portland, billed Stages for \$4,315.07, an amount which represented the ABC servicing fee for financing the loan, the invoice reading as follows:

Portland, Oregon, July 17, 1945

Oregon Motor Stages
506 S.W. Mill Street
Portland, Oregon

In account with
Geo. W. Davidson
Pacific Bldg.

To services rendered

Fee\$4,315.07

Approved for Voucher July
Charge to 4620
Credit to
Approved for Payment

O.K.

/s/ E. Royce

On July 19, 1945, Stages issued its check, No. 7-60, in the amount of \$4,315.07, payable to George W. Davidson of ABC, in payment of the above invoice. The payment was charged to account No. 4620, an expense account, on the books of Stages.

Two months later, on or about August 31, 1945, Stages received a letter dated August 31, 1945, signed by L. R. Bentson, reading as follows:

Vancouver, B. C.

August 31, 1945

Oregon Motor Stages,
Portland, Oregon

Gentlemen:

I hereby offer to sell to Oregon Motor Stages my Three Hundred Fifty (350) shares of stock in the Company for cash at the price of One Thousand Dollars (\$1,000.00) per share, total price Three Hundred Fifty Thousand Dollars (\$350,000.00). You are to have thirty days in which to close the transaction, but it is understood between us that you will make every reasonable effort to do so within a lesser time.

I represent and warrant that my 350 shares of stock are free and clear of encumbrances, save and except for a note in the sum of \$350,000.00 payable to the American Business Credit Corporation and the transfer will be made upon the sole condition that your Company assume and pay the amount of interest that is due and owing from me to said corporation on account of this note.

My object in desiring to dispose of this stock is that the sudden end of the war has made a great difference in my plans, and on this account I desire to be relieved of my obligation to the said American Business Credit Corporation.

Very truly yours,

/s/ L. R. Bentson

August 31, 1945.

The above offer is hereby accepted.

Oregon Motor Stages

/s/ By E. Royce,
President.

In drafting the foregoing letter, the place of the addressor in the letterhead was first typed in as "Vancouver, Washington," then the word "Washington" was erased and "B.C." substituted in its place.

A joint and special meeting of the stockholders and directors of Stages was held on September 5, 1945, at which time such letter was considered. Bentson was one of the stockholders present at the meeting, the minutes of which meeting read in part as follows:

The President, E. Royce, presided and Secretary Robert T. Jacob kept a record of the proceedings.

Consideration was then given to the written offer of stockholder, L. R. Bentson, dated August 31, 1945, copy of which is attached to these minutes.

The president then canvassed each and every stockholder present, either in person or by proxy, and each and every share of stock present, either in person or by proxy, except the 350 shares owned by stockholder, L. R. Bentson, expressly waived the right to sell their shares to the corporation.

Thereupon consideration was given to the applicable Oregon statutes and the balance sheet of the Company as at August 31, 1945 which the President submitted to the meeting was inspected, and thereupon the following resolutions were adopted by the unanimous vote of 400 shares of stock of the

Company, stockholder L. R. Bentson, at his request, being excused from voting:

Whereas, express power is given in the Articles of Incorporation of this Company to purchase its own stock; and

Whereas, this Company has a surplus substantially exceeding \$350,000.00, and it is to the best interests of the Company to use \$350,000.00 of such surplus to retire 350 shares of its issued and outstanding capital stock at a price of \$1,000.00 per share and to use \$350,000.00 of such surplus for such purpose; and

Whereas, such purchase may be made without injury to the existing creditors and all of the stockholders of the Company, except stockholder L. R. Bentson, have waived their priority and have consented that the 350 shares belonging to L. R. Bentson shall be so purchased and retired; and

Whereas, said stock so purchased should be cancelled and the capital stock of the Company reduced in the amount of \$35,000.00, Now, Therefore,

Be It Resolved: That this Company shall purchase and retire 350 shares of stock belonging to L. R. Bentson at the price of \$1,000.00 per share out of its surplus, and that the stock so purchased shall be cancelled; and

Further Resolved: That the capital stock of this Company be reduced from \$75,000.00, divided into 750 shares of the par value of \$100.00 each, to \$40,000.00 divided into 400 shares at the par value of \$100.00 each, and that the Secretary be and he is hereby instructed and directed to file with the

Corporation Commissioner of Oregon an appropriate certificate and affidavit of such reduction in capital stock, as required by law.

There being no further business to come before the meeting, it was duly adjourned.

On September 6, 1945, Stages purchased and retired 350 shares of capital stock, and on the same date issued its check in the amount of \$350,000, payable to L. R. Bentson. The check was endorsed by Bentson and delivered to ABC-Portland in payment of the loan. The payment of \$350,000 was recorded on the books of Stages as a debit to surplus of \$315,000 and a debit to capital stock of \$35,000. On September 17, 1945, Stages issued its check in the amount of \$3,739.73 to ABC-Portland, for interest due and owing on the loan of \$350,000. This payment was charged to interest expense on the books of Stages. On April 2, 1946, the corporation commissioner of the State of Oregon issued to the corporation its certificate of decrease in the capital stock of the corporation from an authorized capital stock of \$75,000 to an authorized capital stock of \$40,000.

Bentson did his own bookkeeping. In his day book Bentson listed in detail items of income and expense, and purchase and sale of securities. It contained numerous entries on stocks purchased and sold by him during the ensuing years, including the year 1945. It did not contain any entries reflecting the purchase or sale of Stages stock in 1945.

Bentson was neither an officer nor a director of

Stages, and he did not participate in the operation of the corporation. Schneider was general manager, vice president and director, and the only one who was actually active in the company's affairs. Jacob was secretary and director. E. Royce was president and director. Niederkrome was treasurer and director. E. Royce, Jacob and B. Royce paid for their Stages stock out of their own funds. Schneider paid for his 50 shares with his own money, although E. Royce advanced him \$50,000 for the purpose for a few days. E. Royce advanced Niederkrome \$55,000 for his 55 shares, and Niederkrome gave him a note for \$55,000. On June 20, 1946, Niederkrome transferred his 55 shares to Schneider at the same price. Schneider paid several thousand dollars on account of the stock and gave a note to E. Royce for the balance. Niederkrome's unpaid note to E. Royce was cancelled, and Schneider's note remained unpaid until the subsequent liquidation of Stages, when a compensatory offset was made against it as among the stockholders.

During the respondent's investigation, Niederkrome confided to respondent's agents that he thought the corporation had obtained the loan from ABC. When the stock in the name of Bentson was offered for sale to Stages on August 31, 1945, no serious effort was made to interest other purchasers in buying the stock. The availability of the Stock for sale in September of 1945 was communicated by Schneider to one of the individuals formerly interested in buying it and Schneider was informed by this individual that he was no longer interested.

Stages was in good financial condition in 1945 and had a very fine earning record. It had paid substantial dividends in the years prior to 1945. Although its bus equipment was becoming somewhat worn, due to the wartime conditions, it had a large reserve available for the purchase of additional equipment; it was doing an excellent business; its gross earnings were in excess of \$1,000,000 per year, and in two years were in excess of \$2,000,000. The petitioners were optimistic about the post-war future of Stages. It was their opinion that the company would prosper after the war, despite an expected decline in revenues as a result of the loss of military business. They thought that wage rates would be reduced, and the population of Oregon doubled, within the next 10 years. They regarded Stages as a very profitable venture, one which presented an excellent opportunity for a good, solid bus operation. Stages had an earned surplus in excess of \$350,000 at the time of the stock redemption on September 6, 1945.

The balance sheets of Stages as of December 31, 1944, and December 31, 1945, disclosed the following financial condition:

	December 31, 1944	December 31, 1945
Assets		
Cash	\$ 199,552.11	\$236,426.54
Receivables	72,661.57	66,898.37
Inventory	13,507.03	20,699.29
Investments (Govt. bonds).....	546,172.58	755.61
Deferred charges	14,514.55	11,413.81
Capital assets (less reserve) ..	447,692.55	504,515.50
Other assets	136,218.05	73,066.31
Total Assets	<u>\$1,430,318.44</u>	<u>\$913,775.43</u>

	December 31, 1944	December 31, 1945
Liabilities		
Payables	\$ 227,559.84	\$263,390.42
Accrued expenses	655,043.98	416,750.83
Other liabilities	1,161.84	91,164.84
	<hr/>	<hr/>
Total Liabilities	\$ 883,765.66	\$771,306.09
	<hr/> <hr/>	<hr/> <hr/>
Net Worth		
Common stock	\$ 100,000.00	\$ 40,000.00
Undivided profits	446,552.78	102,469.34
	<hr/>	<hr/>
Total Net Worth	\$ 546,552.78	\$142,469.34
	<hr/> <hr/>	<hr/> <hr/>

There was no diminution of or curtailment in the corporate activity and business of Stages as a result of the stock redemption. The corporation continued to operate under its permanent franchise under the Interstate Commerce Commission, and it continued to serve the people who desired to use its facilities.

In 1945, Stages expended cash and incurred a long-term obligation of \$90,000 for the purchase of new bus equipment costing \$179,940.71, of which cost \$155,945.71 was expended prior to petitioners' and Bentson's acquisition of Stages stock. In 1945, also, depreciation on Stages' equipment amounted to \$119,564.23, and busses costing \$74,404.12, having a depreciated basis of \$3,877.87, were sold for a net profit of \$18,903.83. In 1946, Stages purchased new bus equipment costing \$183,009.33, and increased its long-term obligations to \$155,000. Depreciation on Stages' equipment in 1946 amounted to \$124,673.58, and busses costing \$148,951.47, and

having a depreciated basis of \$700, were sold for a net profit of \$44,565.81. During 1947, Stages acquired new bus equipment costing \$147,862.99 and a new building costing \$103,390.33; it increased its long-term obligations (equipment) to \$184,934.91; and it incurred a new long-term obligation (building) of \$71,000. Depreciation on Stages' equipment in 1947 amounted to \$138,637.85 and busses costing \$56,722.11, and having a cost basis of \$450, were sold for a profit of \$9,990.24.

The gross revenues and cumulative undivided profits of Stages for the years 1945 to 1948, inclusive, were as follows:

Year	Revenues	Cumulative Undivided Profits at End of Year
1945	\$2,387,331.82	\$102,469.34
1946	1,802,712.13	202,356.07
1947	2,072,584.49	236,983.53
1948	1,756,559.03	218,500.09

Stages did not declare or pay dividends to its stockholders in 1945 and 1946, or in any other year under the operation of the petitioners. The taxable net income of Stages for 1945 and 1946 was \$426,885.28 and \$153,318.31, respectively. In answer to Question No. 8 on the income tax return of Stages for the year 1946 concerning the retention of over 70 per cent of the earnings and profits, the following reason was given:

Company is replacing equipment badly worn through the war use and is buying other equipment to better service. Needs all funds for further expansion.

The record fails to overcome the determination of respondent that Bentson was not a bona fide participant in the transactions leading up to the acquisition of Stages stock and was not a bona fide stockholder in Stages at all times material.

The respondent's determination that the corporate distributions by Stages, in retirement of the 350 shares of its stock issued in the name of Bentson and in payment of certain incidental expenses, were made at a time or under such circumstances as to be essentially equivalent to dividends taxable to petitioners, is not overcome by the evidence of record.

Opinion

The issue presented involves the status of the \$350,000 disbursed by Stages in retirement of the 350 shares of capital stock issued in the name of Bentson and the smaller amounts disbursed to cover the interest and incidental expenses attendant upon the note for \$350,000 signed by Bentson and E. Royce and payable to ABC. That is to say, the question is whether these disbursements are to be considered essentially equivalent to dividends within the meaning of section 115(g) of the 1939 Code¹

¹ Sec. 115. Distribution by Corporations.

* * * * *

(g) Redemption of Stock.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption

and whether, as determined by respondent, such disbursements are taxable to the petitioners or, in the alternative, taxable solely to E. Royce.

In support of his determination, respondent argues that the petitioners purchased the Stages stock with the funds which they in substance borrowed from ABC, which funds were later repaid with those obtained from Stages; that the indebtedness was incurred by and for the benefit of petitioners and that its payment by the corporation constituted a dividend to them. Respondent would thus ignore the presence of Bentson in the transactions as being no more than a straw man for the petitioners, collectively or, in the alternative, for E. Royce, individually. Respondent invokes the well established concept that the use of corporate income for the personal benefit of the stockholders, as distinguished from benefit to the corporate enterprise, constitutes a taxable dividend to the stockholders so benefited. See *H. F. Wall v. United States*, 164 F. 2d 462; *Holloway v. Commissioner*, 203 F. 2d 566, affirming a Memorandum Opinion of this Court; *Woodworth v. Commissioner*, 218 F. 2d 719, affirming a Memorandum Opinion of this Court. See, also, 1 Mertens, *Law of Federal Taxation*, sec. 9.08, and cases cited therein.

On the other hand, petitioners maintain that Bentson was a bona fide participant in the transactions as they actually transpired and that the

or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The record fails to overcome the determination of respondent that Bentson was not a bona fide participant in the transactions leading up to the acquisition of Stages stock and was not a bona fide stockholder in Stages at all times material.

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redemption of the stock issued in Bentson's name was all that it was represented to be, i.e., a valid redemption or cancellation of all of the stock of one stockholder as is contemplated by the provisions of Regs. 111, sec. 29.115-9, reading in part as follows:

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. * * *

The so-called "net effect" test, announced in *Flanagan v. Helvering*, 116 F. 2d 937, has been relied upon by certain of the courts to establish taxability as dividends. The motive for the distribution is a factor for consideration in determining whether a legitimate business purpose was the basis for the redemption. *Keefe v. Cote*, 213 F. 2d 651; *Estate of Henry A. Golwynne*, 26 T.C.—(September 28, 1956). The question in the final analysis must

turn on the facts. The respondent having determined that the redemption was within the terms of the applicable statute, the burden of petitioners was to establish error in that conclusion. Careful consideration of all of the evidence fails to convince us that they have met that burden. Reference to some of the reasons for so concluding may be helpful.

The stockholders remaining after the redemption, who, with the representative of B. Royce, are petitioners, had no desire to acquire in excess of 400 of the 750 shares of stock of Stages. A plan was considered to have Stages acquire the remaining 350 shares and a form of agreement was drafted for that purpose. At that point of the negotiations, Bentson, according to testimony of petitioners, became interested in the venture and, after considering the matter, agreed to purchase the shares. The bona fides of his participation in the venture is a basic issue.

Although there is testimony that Bentson made a fortune in gold mining in Alaska, proof is lacking that in July 1945 he had a net worth ample to undertake the purchase of stock of a selling price of \$350,000. Whatever the legal consequences, it is established that his funds were blocked in Canada. The small estate left by him in 1950, at the age of about 80 years, is some evidence against the contention that he was a man of wealth 5 years earlier, particularly in the light of his refusal to render a net worth statement to an agent of respondent when called upon to do so during the course of his

investigation. He was careful to record small transactions in books personally kept by him but he made no entry of the purchase of stock of Stages. Without some explanation for his failure to record the stock purchase, there is ground for inferring that he did not at the time regard himself as a bona fide stockholder.

The contention of petitioners is based, in part, upon an assertion that Bentson applied for and was granted a loan of \$350,000 by ABC to provide him with cash to make the purchase. There is testimony of petitioners to that effect, but other evidence, which we regard as much more reliable, is to the contrary. Respondent's view is that E. Royce, acting on behalf of petitioners, applied for and negotiated the loan.

The minutes of the executive committee of ABC-Delaware, the parent company, stated, "We are asked to lend Mr. Roy Royce, personally, the sum of \$350,000." They considered and approved a loan of that amount to "R. Royce," secured by all of the 750 shares of stock of Stages. Bentson was not mentioned in the corporate record of ABC and nothing in the minutes of the meeting indicates that Bentson ever applied for the loan or had anything to do with it. Clearly, the loan was made to E. Royce. He and Bentson signed the note as co-makers. Bentson's signature on the note was not required by the executive committee in granting the loan and no proof was made of subsequent action to include him as a borrower. Thus, absent proof of

any requirement by the lender that Bentson sign the note as a co-maker, he would appear to have been a mere volunteer.

Moreover, the evidence convinces us that Bentson did not become involved in the transaction until after application was made for the loan by Royce.

According to the testimony, Bentson became interested as a participant in the venture during a visit to Portland in June 1945 and, after an examination of Stages' financial condition and its assets located in various cities, agreed to buy the uncommitted 350 shares. But, proof is lacking that he was in Portland before application was made to ABC for the loan.

Bentson stayed at the home of E. Royce during his visit. When asked at the hearing when Bentson's visit was made in June, 1945, E. Royce answered by testifying, "Yes, I think about in June." Jacob first testified that he met Bentson for the first time at a meeting attended by him and certain of the petitioners at the home of E. Royce during the middle or latter part of that month, and then that the meeting was held "Sometime the latter part of June. I don't recall the exact date—I remember it was a Sunday." Schneider testified that he heard several days before the meeting that Bentson was interested in acquiring stock of Stages, that he first met Bentson at the meeting, and that thereafter he accompanied Bentson on an inspection tour of all of the bus routes and facilities of Stages lasting 2½ days. The precise time of the inspection trip is not shown.

Without more evidence in support of petitioners on the point, we cannot find that the meeting at the home of E. Royce occurred earlier than the Sunday during the latter part of June 1945. The last Sunday in June fell on the 24th, which was 4 days after the loan application was considered by the executive committee of the parent company in New York City on the submission of the matter by Davidson, vice president of ABC-Portland. Clearly, Bentson, on such facts, could not have signed the application for the loan.

The respondent's determination rests, in part, on a finding that E. Royce alone applied for and negotiated the loan. Aside from the presumptive correctness of the finding, there is ample support in the evidence for that conclusion. And the circumstances are such as to create an inference that he obtained the loan for the benefit of all of the petitioners.

The petitioners did not wish to invest more than \$400,000 of their own money in the stock. Borrowing became either necessary or desirable to acquire the remaining 350 shares, and to obtain a loan, a pledge of all of the stock as security for the loan was required. All of the interested parties agreed to loan their stock for that purpose and it was put up as collateral for payment of the note evidencing the loan concurrently with its acquisition from the sellers. E. Royce thus assumed, as co-maker, primary liability for payment of the note and the other stockholders were liable to the extent of the value of their pledged stock. All benefited by the loan for only with it, was all of the stock acquired.

Aside from these considerations of the question, we search in vain for a justifiable corporate business reason for redeeming the stock. The redemption served to make available funds from surplus with which to pay the outstanding note and put petitioners in a position to repossess their stock free of any encumbrance. The retirement of about 47 per cent of the outstanding stock gave petitioners, collectively, complete ownership of Stages and increased their proportional interests in the remaining assets and future earnings without any additional investment on their part.

Certainly the redemption impaired, rather than improved, the financial condition of Stages, since surplus was charged with \$315,000 of the amount, the same as if a dividend of that amount had been paid. Stages paid substantial dividends prior to 1945 and none thereafter in spite of large earnings.

The large surplus had been built up as a reserve for the purchase of additional equipment, and in the tax return of Stages for 1946 a statement appears that retention of earnings was required for replacement of worn equipment and further expansion. Long-term obligations, aggregating a large amount, were incurred by Stages in 1945, 1946 and 1947 to provide funds for new bus equipment and other assets. The need for money for these purposes was known when the stock was redeemed. Without the redemption of stock outstanding in the name of Bentson, Stages would have had a reserve out of which the property could have been purchased. It

appears from these facts that the reduction in capital stock not only operated to the financial detriment of Stages but that the stockholders were fully aware at that time that such would be the result. In any event, we find no justification for concluding under the evidence that the redemption in question served a legitimate business purpose of Stages.

On this issue, respondent is sustained for lack of proof of error.

As to the item of interest paid by the company in connection with the loan of \$350,000, there is in the record insufficient proof to enable us to hold that respondent erred in his treatment of such item.

Issue 2.

Findings of Fact.

On April 13, 1944, L. W. Hendrickson and his wife, Sue Hendrickson, owned real and personal property located at N.W. 21st and Burnside Streets, Portland, Oregon. The property consisted of an improved 2-story building. There were 7 stores on the ground floor and 1 large ballroom known as the Palais Royale Ballroom on the second floor. The property was subject to a first mortgage to Washington Mutual Savings Bank in the sum of approximately \$35,300. The Hendricksons were having financial and marital troubles and in order to carry himself through his financial difficulties, Hendrickson needed \$10,500. The property was placed in the hands of a realtor, I. O. Holmen, for sale. E. Royce was interested in the Palais Royale Ballroom, which he thought should be profitable on

account of the war, and the great number of young men presently in Portland. He was not interested in buying the entire property at that time, and initially wanted only to lease the dance hall part.

On April 13, 1944, the Hendricksons executed an option agreement pursuant to which E. Royce was given a 5-year option to purchase the property in question. This option provided, in part, as follows:

It is understood that said property is now under lease for a term which will expire April 19, 1949, and this option is upon condition and can only be exercised after all rentals reserved in said lease have been fully paid either at the time specified in said lease or in advance thereof. Said rentals having been previously fully paid, said E. Royce may exercise this option at any time prior to April 19th, 1949, and if not exercised before the day last mentioned, this instrument shall on that day become void.

It is expected that some part of the obligations outstanding against said property and mentioned in said lease will still remain unpaid at the expiration of the term of said lease.

To exercise this option, said E. Royce shall first pay or assume any remaining unpaid balance of said outstanding obligations, including principal and interest, and he shall, in addition, tender to us or either of us a sum of money the amount of which shall be determined in the following manner, to-wit:

By subtracting from the sum of \$35,000.00 the aggregate of principal of said outstanding indebtedness plus interest thereon to the date of exercis-

ing said option, and the sum obtained after subtracting said amount from \$35,000.00 shall be the sum to be paid to us, and nothing further shall be required of the said E. Royce to entitle him to conveyance of said property.

And we hereby consent, agree and direct that a certain deed of said real property and a bill of sale of said personal property this day executed by us to said E. Royce in anticipation of his exercising said option and placed in escrow with this agreement shall, upon the exercise of said option in the manner above stated, be delivered by the escrow agent to the said E. Royce.

Providing that if the said E. Royce shall fail to exercise said option, as herein provided and within the time herein provided, or if the Lessee under said lease, or its assigns, shall for any reason surrender or abandon said lease, or discontinue all effort to carry on under said lease, then and in either of said events said deed and bill of sale so placed in escrow shall be returned to us for cancellation.

On the same date, April 13, 1944, a deed and bill of sale were executed by the Hendricksons, conveying title to the premises and personal property therein to E. Royce, in anticipation of his exercising such option. These documents, together with the option agreement, were placed in escrow with the Bank of California, Portland, Oregon, with instructions to deliver the deed and bill of sale to E. Royce as soon as the option was exercised. These

instructions were set forth in a letter dated May 12, 1944, and read, in part, as follows:

On or about April 26, 1944, the undersigned placed with you, as an Escrow Agent for them, a Warranty Deed, Bill of Sale and Option Agreement together with a letter of instructions which letter read as follows:

“April 26, 1944

Bank of California
National Association
Portland Branch
Portland, Oregon

Gentlemen:

I hand you herewith Warranty Deed, executed by Lloyd W. Hendrickson and Sue Hendrickson, husband and wife, in favor of E. Royce, conveying a portion of Block 31, Kings Second Addition to the City of Portland; also Bill of Sale between the same parties, covering equipment located and being in the building erected upon the above described property.

Mr. and Mrs. Hendrickson have granted unto Mr. E. Royce an option to buy the above described real and personal property. This option is dated April 13, 1944, a copy being attached hereto and made a part hereof.

You are to hold the Deed and Bill of Sale subject to the conditions set out in said option and are to deliver them according to the terms as set out therein. Lloyd W. Hendrickson will notify you when all the terms of said option have been com-

plied with and you will then deliver to Mr. E. Royce the Deed and Bill of Sale. No investigation will be required upon your part to determine whether or not the terms of said option have been complied with.

The charges or expenses for holding said escrow are to be paid one-half by Mr. E. Royce and one-half by Lloyd W. Hendrickson and Sue Hendrickson.

Yours truly,

Lloyd W. Hendrickson

Sue Hendrickson

Approved By:

E. Royce"

Now, while affirming said letter but for the purpose of simplifying and interpreting its terms and meeting certain requirements made by you, we agree as follows:

1. That it shall be the duty of said E. Royce upon exercising said option to give to you written notice thereof.

2. When you shall have such notice from said E. Royce and shall also have been advised by said Lloyd W. Hendrickson that all the terms of said option have been complied with, you shall deliver said Deed and Bill of Sale so left in Escrow to said E. Royce.

3. If said E. Royce shall fail to exercise said option, under the terms of said option agreement (copy of which was made a part of said letter and is now in your possession) then you are to de-

liver said Deed and Bill of Sale to said Lloyd W. Hendrickson and Sue Hendrickson under the terms of said option agreement. * * * * *

/s/ L. W. Hendrickson

/s/ Sue Hendrickson

On April 17, 1944, E. Royce, Schneider and Harold Murphy organized Burnside Realty, Inc., an Oregon corporation (hereinafter called Burnside), with an authorized capital stock of \$1,500.00, consisting of 30 shares, par value \$50 per share. Each of the organizers subscribed to and paid for 10 shares, and thereby acquired a one-third interest, respectively, in the corporation. Schneider was elected president, Murphy vice president and E. Royce secretary-treasurer. Subsequently, on or about January 1, 1946, each of the original shareholders relinquished $2\frac{1}{2}$ per cent of their shares of stock, all of which were reissued to Edward J. Cheney, thus making 4 stockholders with each having a 25 per cent interest. Cheney maintained a dance school. Shortly after the corporation was organized, Cheney moved his dancing classes and dance school to this property. Cheney subsequently transferred title to his school of dancing to Burnside for 25 per cent of the stock of the corporation. An annual meeting of the board of directors of Burnside was held on the 14th day of January, 1946. The same officers were re-elected and thereafter the following motion was unanimously adopted:

Upon motion duly made, seconded and car-

ried, unanimously, it was agreed that each of the Directors who are equal stockholders of all of the capital stock of Burnside Realty, Inc., each owning 10 shares, should surrender $2\frac{1}{2}$ shares of stock and that the total of said stock surrendered, $7\frac{1}{2}$ shares, should be reissued by the Secretary to Edward J. Cheney, and that as payment in full for said $7\frac{1}{2}$ shares of stock the said Edward J. Cheney was to transfer to Burnside Realty, Inc. his School of Dancing now being conducted by him in the premises known as the Palais Royale Ballroom at 2114 S.W. Burnside, Portland, Oregon.

An annual meeting of the stockholders of the corporation was held on January 13, 1947, at which meeting E. Royce, Schneider and Cheney were elected directors of the corporation. At an annual meeting of the board of directors held on the same day, Schneider was elected president, Cheney vice president, and E. Royce secretary-treasurer of the corporation.

Burnside was organized to engage in the business of operating rental properties and of operating a dance hall. On April 21, 1944, at a meeting of the directors of Burnside Realty, Inc., a resolution was unanimously adopted authorizing the corporation to lease the premises from the Hendricksons for a term of 5 years from April 19, 1944, at a monthly rental of \$1,500. On April 26, 1944, each of the stockholders loaned the corporation \$3,500, or a total of \$10,500, in return for which the corpora-

tion executed a promissory note for \$3,500 to each of them.

On or about April 29, 1944, the Hendricksons leased the property to Burnside Realty, Inc., for the agreed payments of \$1,500 per month and for a 5-year term. On April 26, 1944, the corporation deposited \$10,500 with the Hendricksons pursuant to the terms of the lease. This deposit represented the rent for the first month and the last 6 months of the lease. The lease to Burnside read, in part, as follows:

Agreement made April 29, 1944, between Lloyd W. Hendrickson and Sue Hendrickson * * * herein called "First Parties", and Burnside Realty, Inc. * * * herein called "Second Party",

Wherein it is mutually agreed as follows:

1. The First Parties hereby lease unto Second Party and Second Party hereby hires from First Parties all that plot of land with buildings * * * described as follows:

That portion of Block 31, King's Second Addition to the City of Portland [at Northwest 21st and Burnside Streets] * * *

* * * * *

together with the fixtures, furniture, furnishings and equipment now in, upon or attached to said premises * * * for the term of five years commencing April 19, 1944, and ending April 19, 1949, at the monthly rental of \$1500.00 to be paid in advance on or before the first day of each and every month of said term, except as hereinafter stated.

2. The rent for the first month and the last six months of said term, being \$10,500.00, has been paid

at the time of the signing of this instrument, and First Parties do hereby acknowledge receipt of same.

3. The rent being now paid to the 19th day of May, 1944 and all parties desiring that monthly rentals shall fall due on the first day of each month instead of the 19th day of each month, it is agreed that on or before May 19, 1944, Second Party will pay the rent, at the rate per month above stated, for the balance of the month of May, 1944, that is to say, from May 19, 1944 to June 1, 1944, to wit the sum of \$639.34, and thereafter the monthly rentals shall be paid on or before the first day of each month in advance.

4. In addition to the rental above stated, Second Party agrees to pay all taxes and fire insurance premiums for insurance on said property for the term of this lease.

5. It is understood that there is now a first mortgage on said real property held by Washington Mutual Savings Bank, which has agents at 236 S.W. Broadway in the city of Portland, county of Multnomah, state of Oregon, on which there is an unpaid balance as of this date of about \$35,300.00. That said mortgage bears 5% interest and by the terms thereof is payable \$550.00 per month, \$200.00 of which is set aside to pay taxes and fire insurance on the property, and the balance of \$350.00 is applied to pay interest and principal on the mortgage. It is understood that said mortgage is not assumed by Second Party, but payments thereon shall be made from rentals under this lease as hereinafter expressly provided, to the end that said

mortgage shall not at any time become in default during the term of this lease.

6. It is also understood that First Parties had outstanding against them two other obligations; one of \$7,109.39 and one of \$1,487.98, now held by Carroll, Hillman & Hedlund of said city of Portland, and said obligations may be liquidated by the payment of about \$179.05 monthly. These obligations are not assumed by the Second Party but shall be paid out of the rentals as hereinafter provided.

7. That beginning June 1, 1944, the monthly rentals shall be [applied] as follows:

(a) The sum of \$350.00 to said Washington Mutual Savings Bank, to be applied on said mortgage held by said bank.

(And to each such payment of \$350.00 Second Party shall add \$200.00, not a part of the rental money, as a fund to meet taxes and insurance under the terms of said mortgage, to the end that the conditions of said mortgage shall not be broken. It being herein agreed that Second Party shall pay all taxes, fire insurance, as a part of the consideration of this lease.)

(b) To Carroll, Hillman & Hedlund, the sum of \$179.05 to liquidate the principal and interest of said obligations held by them.

(c) To I. O. Holmen, the sum of \$117.92 to pay his commission as a realtor in effecting this transaction, it being understood that the total amount due him as such commission is the sum of \$6250.00.

(d) To Lloyd W. Hendrickson and Sue Hendrickson, the balance of said monthly rental, which should be about \$853.03.

The rent covering the period from May 19, 1944 to June 1, 1944 shall be paid to First Parties and need not be distributed as other payments are to be distributed under this paragraph.

8. It is further agreed, anything herein to the contrary notwithstanding, that all rental payments provided for in Paragraph 7 hereof shall be made by checks payable to the respective payees, which checks shall be turned over by Second Party to First Parties and by First Parties immediately delivered to the respective payees.

The lease covered the entire property, and the subtenants on the lower floor paid their rent directly to Burnside. During all of the years involved herein, Burnside operated the rental properties and the ballroom therein, and made the payments called for under the lease agreement. The payments made by Burnside were allocated and paid in accordance with paragraph 7 of the lease agreement.

Shortly after the option and lease agreement were negotiated, Sue Hendrickson obtained a divorce from L. W. Hendrickson. On December 4, 1945, L. W. Hendrickson sold his share of the money payments which he was entitled to receive under the lease and all his interest therein to C. T. Terril. Terril in turn assigned all the rights so acquired by him to B. Royce and Isabelle Royce on December 6, 1945.

On or about April 16, 1949, E. Royce exercised the option to purchase the property in accordance with the terms thereof. He paid \$35,000 under the option, as follows:

Payment to Sue Miller (formerly

Sue Hendrickson)	\$ 6,531.15
Liability to B. Royce.	6,531.15
Balance due on mortgage.	21,937.70

Total Option Price. \$35,000.00

The deed and bill of sale previously executed by the Hendricksons under date of April 13, 1944, conveying title to E. Royce, were then delivered to E. Royce by the escrow agent, and on September 23, 1949, the deed was recorded in the Record of Deeds for Multnomah County, Oregon.

Schneider and Murphy have recently instituted a joint suit against E. Royce for an accounting, claiming equal ownership in the property in question.

The respondent has determined that E. Royce acquired the property at N. W. 21st and Burnside Streets, Portland, Oregon, by purchase in April 1944 for a total consideration of \$125,000, computed as follows:

60 monthly payments by Burnside Realty, Inc., of \$1,500 each.	\$ 90,000
Option price of \$35,000 paid on April 16, 1949, as follows:	
Balance due on mortgage.	\$21,937.70
Payment to Sue Miller (formerly Sue Hendrickson)	6,531.15
Liability to B. Royce.	6,531.15
	<hr/> 35,000
Total	<hr/> \$125,000

The respondent further held "that the rental payments made by Burnside Realty, Inc. pursuant to the lease agreement dated April 29, 1944, on such property, reduced by allowable depreciation, constitutes taxable income to you [E. Royce]. Taxable income reported for the years 1944 to 1947, inclusive, has, therefore, been increased by [such amounts] * * *."

Opinion

On April 13, 1944, E. Royce obtained a 5-year option to buy the Burnside Street property for a fixed price of \$35,000. On the same day, a deed and bill of sale were executed and, on April 26, 1944, placed in escrow with instructions to deliver the documents to E. Royce as soon as duly notified that the option had been exercised. Burnside was organized April 17, 1944, to engage in the business of operating rental properties and a dance hall. E. Royce was one of three original stockholders, each owning one-third interest and paying \$500 therefor. Later, a fourth stockholder was added, after which each party owned 25 per cent. Each of the original stockholders, on April 26, 1944, loaned the corporation \$3,500, receiving promissory notes in return. On April 29, 1944, the owners of the property (the Hendricksons) leased the same to Burnside for agreed payments of \$1,500 per month over a 5-year term. The corporation had deposited the sum of \$10,500 with the original owners of the property, which sum was to be applied to the rent under the provisions of the lease.

On April 16, 1949, E. Royce exercised his option to purchase the property by paying the agreed sum of \$35,000 provided in the option and thereby liquidating certain specified obligations. Thereafter, the deed and bill of sale were duly delivered to E. Royce as the owner of the property.

We are unable to follow respondent's reasoning by which he concludes that E. Royce acquired the property by purchase in April 1944 for a consideration of \$125,000, consisting of \$90,000 rent paid by Burnside over a 5-year period plus the \$35,000 provided by the option and paid by Royce. Nor can we agree that, as respondent contends, Royce derived income from the rental payments during the 5-year term of the lease. So far as the record shows, the transactions were wholly above board and were what they seem to be—a lease to the corporation in which Royce was a minority stockholder and an option to purchase granted to E. Royce on specified conditions, all of which were strictly complied with. The placing of the deed and bill of sale in escrow was a perfectly normal procedure. Title did not pass to Royce until he exercised the option and fully complied with its terms. Royce derived no taxable income from the rent payments by the corporation. Respondent is reversed. Cf. 2 Lexington Avenue Corp., 26 T.C. . . . (July 13, 1956), in which a somewhat comparable set of facts was involved.

Issue 3

Findings of Fact

The Hippodrome Amusement Company (herein-

after sometimes called Hippodrome) was an Oregon corporation engaged in the business of renting property at Seaside, Oregon. It owned two pieces of property in the center of the city, one improved, the other unimproved. Most of the improved property was devoted to rental purposes, and the balance, in 1945, was used as a dance hall. In 1945, the issued and outstanding stock of the corporation was owned as follows:

E. Royce	218	shares
B. Royce	111	"
Niederkrome	19	"
Stephen Bartle	5	"
<hr/>		
Total	353	"

The first three persons above listed were directors. E. Royce was president and Niederkrome secretary and auditor of the corporation. The latter worked under the former and, to a considerable extent, followed his instructions and orders.

On December 28, 1945, Hippodrome issued a check payable to E. Royce in the amount of \$20,000. This payment to E. Royce was recorded on the corporate books by debiting an account receivable, entitled "Due from Stockholders," and crediting the cash account. The disbursement of \$20,000 to E. Royce was made with the consent and agreement of B. Royce and Niederkrome. There were no minutes of the corporation authorizing such payment. E. Royce executed no note or other evidence of indebtedness, he paid no interest at any time, and to

the time of the hearing had made no repayment. E. Royce has at all times been financially able to repay the amount withdrawn by him. His personal financial statement in 1945 reflected a net worth of \$1,366,000. He had large investments in many business enterprises. In 1945, E. Royce loaned Niederkrome \$55,000, advanced Schneider \$50,000, and invested \$145,000 in stock of Stages. Later he financed the development of a gold mine called Alder Gold-Copper Company, promoted the sale of its stock, and obligated himself to supply the company with \$250,000. In 1945, he reported a net income of \$122,951.95, which included earnings of \$113,530.63 from five partnerships, namely, Yellow Cab Company of Seattle, Gray Line Motor Tours of Seattle, Yellow Cab Company of Portland, Royce Brothers of Portland, and Queen City Garage of Seattle.

In 1948, Hippodrome disbursed \$400 to Niederkrome which was also charged to the account receivable entitled "Due from Stockholders." Similarly, as in the case of E. Royce, there were no corporate minutes authorizing the payment; he executed no note or other evidence of indebtedness; he paid no interest at any time; and there has been no repayment.

On April 1, 1954, Niederkrome opened new accounts on the books of Hippodrome entitled "Notes Receivable—E. Royce" and "Notes Receivable—F. C. Niederkrome," to which he debited \$20,000 and \$400, respectively, at the same time crediting the

"Due from Stockholders" account with \$20,400, thus closing out such account.

Hippodrome operated at a loss before the war and carried a deficit for about 10 years during the 30's. In the early years it was necessary for E. Royce and B. Royce to advance moneys to the company at times to help it out. The financial and operating condition of the company improved thereafter and, in the years before 1945, an earned surplus was built up, and funds were accumulated. The company continued to prosper in 1945 and the years subsequent thereto, and is presently a company in good financial standing with a book net worth of \$70,000, the fair value of which is probably \$140,000. Hippodrome operated on the basis of a fiscal year ending March 31. On March 31, 1945, the earned surplus was \$16,576.34. It had earnings of \$5,127.06 from operations during the year ended March 31, 1946. The earned surplus on March 31, 1946, was \$21,703.40. There was no formal declaration of dividends by Hippodrome in December 1945.

Hippodrome Amusement Company had no building program or plans for immediate expansion in 1945. Its plans for the remodeling of its buildings, or for the construction of a building on the vacant portion of its property, were not conceived or developed until 1948 or 1949.

In 1948 or 1949, plans were made based on the idea of Hippodrome building a ticket office and terminal for Stages. Such plans never materialized.

Stages in 1948 purchased two vacant lots adjacent to its present terminal in Seaside to provide turn-around facilities for its buses. In 1954, Hippodrome entered into negotiations with the Post Office Department to erect a post office building on the unimproved portion of its property. A preliminary sketch for the building was obtained on March 17, 1954, at a cost of \$60, but the negotiations were not successful. At the time of the hearing, E. Royce was negotiating with Pacific Greyhound, the largest motor operator on the West Coast, to provide it with a new location on the property, with better facilities than those which Pacific Greyhound had at Seaside.

We find as an ultimate conclusion of fact that the withdrawal of \$20,000 by E. Royce in 1945 was not a loan to him by Hippodrome, but was a distribution out of the profits taxable as a dividend.

Opinion

This issue involves only Docket No. 51527 and poses the question of whether the amount of \$20,000 withdrawn from Hippodrome by E. Royce in 1945 was received by him as a dividend or as a loan. Respondent determined the former and petitioner urges the latter. The appropriate statute is section 115(a), Internal Revenue Code of 1939.²

² Sec. 115. Distributions by Corporations.

(a) Definition of Dividend.—The term “dividend” when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913 * * *.

The question at issue turns largely on the intent of E. Royce and of Hippodrome in the premises and at the material times. That is to say, was the withdrawal intended to be left to the permanent use of Royce in lieu of a dividend or was he merely a borrower? *Carl L. White*, 17 T.C. 1562; *Wiese v. Commissioner*, 93 F. 2d 921, affirming 35 B.T.A. 701. The intent of the parties is to be inferred from all the facts and inferences found on the record. The present facts, in our considered opinion, properly give rise to the controlling inference that the withdrawal, which has never been repaid, was, at all times material, intended to be and was in fact a distribution of profits and not a loan to Royce—hence our holding and finding of such a fact.

Although there is not total agreement among the facts, the above conclusion is well buttressed. The greater probative weight of the evidence and the greater logic of the inferences are in opposition to petitioner's contention. On the whole record, we are convinced and have found that the payment was not a loan but was a distribution of profits taxable as a dividend. Certain it is that petitioner, who has the burden of proof, has not proven the contrary. We have searched the record in vain for a valid or persuasive reason for the corporation loaning Royce, its majority stockholder and whose net worth was well in excess of \$1,000,000, the relatively small sum of \$20,000. Nor can we find a valid or persuasive reason, if the payment was a loan, for not repaying the same to the corporation. Respondent is sustained.

Issue 4

Findings of Fact

Prior to August 1, 1942, Yellow Cab Incorporated was an Oregon corporation engaged in the operation of a taxicab business in Portland, Oregon. On August 1, 1942, the corporation was liquidated and dissolved. On the same date, August 1, 1942, a partnership under the name of Yellow Cab Company (hereinafter called Portland partnership) was formed to operate the business formerly conducted by the corporation. On July 31, 1942, immediately prior to the dissolution of the corporation, E. Royce transferred 14,000 shares of the corporate stock to his wife, Dora F. Royce. This transfer represented slightly less than half of the shares of stock formerly held by him. The transfer of the stock to Dora was made in anticipation of the planned dissolution of the corporation and the simultaneous formation of the partnership, and the purpose of the transfer was to qualify Dora for admission to the partnership.

The Agreement and Articles of Partnership of Portland Yellow Cab provided, in part, as follows:

The following Articles of Partnership entered into on this 1st day of August, 1942, by and between E. Royce, B. Royce, Charles W. Keffer, C. H. Luton, Dora F. Royce and Isabelle H. Royce, of Portland, Oregon, and Vancouver, Washington.

Witnesseth:

That, Whereas, the parties hereto owned all of the common stock of Yellow Cab Incorporated, a corporation; and

Whereas, upon the liquidation of said company on the 1st day of August, 1942, said company sold, assigned and transferred to the parties hereto all its assets; and

Whereas, the parties hereto have assumed all of the liabilities of the corporation;

Now, Therefore, It Is Mutually Agreed by and between the parties hereto that they will accept said assets and assume all of the liabilities of said corporation, and that the following agreements shall constitute their

Articles of Partnership

I.

Said parties above named agree to carry on business under the name and style of

Yellow Cab Company

II.

The partnership to which this agreement applies began on this the 1st day of August, 1942, and shall continue for the duration of the joint lives of the parties hereto, unless otherwise dissolved by action of the parties.

* * * * *

IV.

The principal office and place of business of the partnership shall be in the City of Portland, Multnomah County, Oregon, and at such other place or places as the partners shall hereafter determine.

V.

The capital of said partnership shall consist of the assets formerly owned by Yellow Cab Incor-

porated, a corporation, together with all the income and profits arising from the employment of said assets in the business conducted hereunder and not paid to the partners in drawings or by disbursement of profits, and the interests of the respective partners hereto shall be as follows:

E. Royce	26.1575%
B. Royce	26.1575%
Charles W. Keffer	.659 %
C. H. Luton	.906 %
Dora F. Royce	23.06 %
Isabelle H. Royce	23.06 %

* * * * *

VII.

The profits and losses of the partnership business shall be borne by the parties in the proportion to the interest designated in paragraph V above.

VIII.

Each of the parties shall have an equal voice in the control of the business and operation of the partnership. It shall be the duty of the partnership to keep accurate books of account, which shall be open at all reasonable times to the inspection and examination of each of the partners.

IX.

Upon the dissolution of the partnership at or prior to the death of any of the partners, the said business shall be wound up, debts of the partners to the partnership, if any, paid, and the surplus divided between the partners according to their respective interests as herein set forth.

In Witness Whereof, the parties hereto have cause [sic] their signatures to be affixed to these Articles of Partnership on the day and date first above written.

/s/ E. Royce

/s/ B. Royce

/s/ C. H. Luton

/s/ Charles W. Keffer

/s/ Dora F. Royce

/s/ Isabelle H. Royce.

Luton and Keffer, referred to above, were employees, and their small partnership interests were purchased by E. Royce and B. Royce on November 28, 1942.

Prior to April 20, 1944, Yellow Cab Company of Seattle was a Washington corporation engaged in the operation of a taxicab business in Seattle, Washington. The issued and outstanding shares of stock of the corporation were owned as follows:

W. L. Rothschild	607 $\frac{1}{2}$
J. A. Baldi	606
Geo. E. Worster	606
D. N. Newton	606
E. Royce	1,402 $\frac{1}{2}$
B. Royce	1,402 $\frac{1}{2}$
A. H. Wenck	269
<hr/>	
Total Shares	5,500

On May 1, 1944, the Yellow Cab Company was liquidated and dissolved. On the same date, May 1, 1944, a partnership of the same name (hereinafter called

Seattle partnership) was formed to operate the business formerly conducted by the corporation.

On April 20, 1944, immediately prior to the dissolution of the Seattle corporation, E. Royce transferred 402½ shares of the corporate stock to his wife, Dora F. Royce. At the same time he transferred 700 shares of the stock to himself as trustee for his minor daughter, Eunice Royce, then 14 or 15 years of age. He retained 300 shares of stock for himself. On the same date, April 20, 1944, E. Royce executed a declaration of trust by which he declared himself trustee of the 700 shares of stock in trust for Eunice Royce. The transfers of the stock to Dora F. Royce, and to himself as trustee for Eunice Royce, were made in anticipation of the planned dissolution of the corporation and the simultaneous formation of the partnership, and the purpose of the transfers of stock was to qualify Dora and the trust for admission to the partnership. Gift tax returns were filed covering the gifts of stock in the Seattle corporation to both Dora and the trust.

The Articles of Copartnership of the Seattle partnership provided, in part, as follows:

This Agreement, made as of May 1, 1944, by and between B. Royce, First Party, E. Royce, Second Party, E. Royce, Trustee for E. M. Royce, a minor, Third Party, D. F. Royce, Fourth Party, A. H. Wenck, Fifth Party, W. L. Rothschild, Sixth Party, J. A. Baldi, Seventh Party, G. E. Worster, Eighth Party, D. N. Newton, Ninth Party, and L. S. Ackerman, Tenth Party, Witnesseth:

Formation of Partnership. First: The parties hereto hereby associate themselves as partners and hereby form and constitute themselves a partnership under the laws of the State of Washington, for the purpose of conducting a business of transportation of persons for hire by means of taxicabs, in the City of Seattle, State of Washington, or any other transportation business whether of persons or property which may be determined upon by decision of two-thirds in interest of the partners.

Term. Second: The term of the partnership shall commence on May 1, 1944 and shall terminate on May 1, 1949; provided, however, that this agreement shall be automatically extended for further and additional successive periods of five (5) years each, unless any party give written notice to the other parties of his or her intention to terminate this agreement at the expiration of any five-year period, such notice to be given not less than sixty (60) days prior to the first day of May of the year in which such notice is given.

Location of Business. Third: The location of the principal place of business of the partnership shall be in the City of Seattle, King County, State of Washington.

Name. Fourth: The said partnership shall be conducted under the firm name and style of Yellow Cab Company. No partner shall have any right to the use of the name apart from this partnership or any successor partnership which may be formed of which such partner may be a member.

Capital. Fifth: The partnership shall commence business with a capital consisting of all assets of whatsoever kind and nature of Yellow Cab Company of Seattle, a Washington corporation, as the same were on April 30, 1944, subject to the liabilities of said corporation, which said liabilities are hereby assumed by the partnership. The Parties of the First to the Ninth Parts, inclusive, are stockholders of Yellow Cab Company of Seattle, owning and holding all of the outstanding stock of said corporation, and said parties do hereby sell, assign, transfer and set over unto the partnership hereby formed all of such assets distributed to them upon final liquidation of said corporation, subject to all the liabilities of said corporation. The Parties of the Sixth, Seventh, Eighth and Ninth Parts have sold to the Party of the Tenth Part one-fifth ($1/5$) of their interest in such assets distributed to them upon final liquidation of said Yellow Cab Company of Seattle.

Decisions as to Partnership Matters. Sixth: Except as otherwise herein provided, decisions as to partnership matters shall be made by a majority in interest of the partners.

Salaries and Distributions of Profits. Seventh: Partnership profits shall be paid and applied as follows and in the following order of priority:

(a) A. H. Wenck, Fifth Party, shall manage the business of the partnership and shall receive a monthly salary in such amount as may be determined from time to time by decision of the partners.

(b) B. Royce, First Party, E. Royce, Second Party, W. L. Rothschild, Sixth Party, and J. A. Baldi, Seventh Party, will devote as much of their time to the business of the partnership as they deem necessary. Each such party shall be sole judge of the amount of his own time necessary for such purpose. W. L. Rothschild and J. A. Baldi will serve without compensation. B. Royce and E. Royce will each receive two and one-half per cent ($2\frac{1}{2}\%$) of the net profits of the partnership business, but not exceeding Five Thousand Dollars (\$5000) each per annum.

(c) The balance of the profits, if any, shall be divided among the partners as follows:

Name and percentage:

B. Royce— $1402\frac{1}{2}/5500$ ths

E. Royce— $300/5500$ ths

E. Royce, Trustee for E. M. Royce, a minor— $700/5500$ ths

D. F. Royce— $402\frac{1}{2}/5500$ ths

A. H. Wenck— $269\frac{1}{2}/5500$ ths

W. L. Rothschild— $485\frac{1}{2}/5500$ ths

J. A. Baldi— $485/5500$ ths.

G. E. Worster— $485/5500$ ths

D. N. Newton— $485/5500$ ths

L. S. Ackerman— $485/5500$ ths

and any loss sustained on account of said business shall be borne in the proportions last hereinabove mentioned * * *

Drawing Accounts and Distributions of Profits.
Eighth: No withdrawals of capital or payment of

profits shall be made by or to any partner unless such withdrawals or payments are uniform as to all partners in proportion to their respective interests and are authorized by decision of the partners.

Duties of Partners. Ninth: A. H. Wenck, Fifth Party, shall devote all of his time to the business of the partnership and during its continuance shall not engage in any other business (except Gray Line Tours) unless authorized by decision of the partners * * *

* * * * *

In Witness Whereof, the undersigned have caused these presents to be executed as of the day and year first hereinabove written.

/s/ B. Royce

/s/ E. Royce

/s/ E. M. Royce

By E. Royce, Trustee

/s/ D. F. Royce

/s/ A. H. Wenck

/s/ W. L. Rothschild

/s/ J. A. Baldi

/s/ Geo. E. Worster

/s/ D. N. Newton

/s/ L. S. Ackerman.

The Portland partnership and the Seattle partnership kept their books and prepared their tax returns on an accrual basis of accounting during all the years in question. E. Royce was the most active partner in the Portland partnership. He made the important decisions as well as the day-to-day decisions involved in the operation of the business. He

was in charge of the office, and his supervision and management included the shop and garage personnel. B. Royce was relatively inactive. Niederkrome was accountant for the Portland partnership. Dora devoted some time to checking the drivers and cars at the stands, boats, depots and any place in Portland where the cabs came frequently to pick up or discharge passengers. She also checked the appearance and condition of uniforms, cleanliness, number of passengers carried and made written reports on these matters to the office. On Schedule I of the partnership returns filed by the Portland partnership for the years 1946 through 1949, no percentage of time devoted to the business by Dora is indicated. Duties similar to those rendered by Dora for the Portland partnership were rendered by an employee of the Seattle partnership for that firm.

The drawing accounts of Dora and E. Royce on the books of the Portland partnership show withdrawals during the taxable years 1944 through 1947, as follows:

Year	Dora F. Royce	E. Royce
1944	\$ 48,777.75	\$ 58,184.94
1945	69,180.00	80,820.00
1946	48,865.01	57,086.99
1947	4,612.00	5,388.00
	<hr/>	<hr/>
Total	\$171,434.76	\$201,479.93

The withdrawals of both from the Seattle partnership during the years 1945 through 1949, were as follows:

Year	Dora F. Royce	E. Royce
1945	\$41,622.53	\$30,994.97
1946	19,662.53	14,644.97
1947	12,342.53	9,194.97
1948	12,342.53	9,194.97
1949	5,022.53	3,744.97
<hr/>		
Total	\$90,992.65	\$67,774.85

At the end of 1947, the Portland partnership's accumulated earnings distributable to Dora exceeded her withdrawals by \$35,434.76, and those distributable to E. Royce exceeded his withdrawals by \$38,395.26. At the end of 1949, the Seattle partnership's accumulated earnings distributable to Dora and E. Royce exceeded their withdrawals by the amounts of \$18,733.16 and \$14,008.75, respectively.

The foregoing withdrawals by Dora were in the form of checks made payable to her. Checks so issued to her by the Portland partnership in 1944, in the aggregate amount of \$48,777.75, were endorsed in blank. Another check so issued to her by the Portland partnership on February 23, 1945, in the amount of \$11,530, was also endorsed in blank by Dora and paid by the drawee, The U. S. National Bank, on April 3, 1945. All other checks issued to Dora by the Portland partnership and all those issued to her by the Seattle partnership, totaling \$170,479.59, were endorsed in blank both by her and by E. Royce.

During the year 1944 and through July of 1945, Dora maintained a checking account at the Sixth

and Morrison Branch of The First National Bank of Portland in the name of "Mrs. E. Royce." Beginning with August 1945, the account was in the name of "Dora F. Royce." The deposits to and withdrawals from this account for the years 1944 through 1947 were as follows:

Year	Deposits	Withdrawals
1944	\$ 21,386.75	\$ 22,507.83
1945	38,712.25	36,114.11
1946	73,491.78	71,563.02
1947	46,485.00	50,106.19
Total	<hr/> \$180,075.78	<hr/> \$180,291.15

The foregoing deposits represented some of the distribution checks above mentioned. Dora also had occasion to use a safe deposit box during each of the taxable years, into which were placed various amounts of cash derived from such distributions. The balance in the account on January 1, 1944, was \$2,242.57 and on December 31, 1947, \$2,648.91.

A substantial portion of the partnership earnings distributed to Dora by both partnerships were expended in payment of state and Federal taxes. The amounts so expended by Dora for Federal taxes for the years 1944 to 1947 were as follows:

Year	Amount
1944.....	\$ 29,793.72
1945.....	57,315.46
1946.....	51,721.22
1947.....	29,454.14
Total.....	<hr/> \$168,284.54

Dora filed joint returns with E. Royce for 1948 and 1949, and taxes were paid in the amounts of \$28,230.87 and \$17,522.44, respectively, or a total of \$45,753.31.

A portion of the distributions made to Dora by both partnerships was expended by her for such items as:

Item	Approximate Cost
2 Fur Coats	\$ 1,850
2 Chrysler Autos	8,000
Plymouth and Cadillac	Unknown
Exercycle	350
Silverware	1,800
Lace Cloth	400
Government Bonds	7,000
Missouri-Pacific Stock	2,500
House Improvements	18,000

In addition to the above amounts, a total of approximately \$70,000 was loaned to E. Royce to be invested in Alder Gold-Copper Company, a company in which, in 1947 and years subsequent thereto, E. Royce was interested. Other amounts were given to E. Royce to reimburse him for payments he had made for Dora.

Respondent determined that Dora F. Royce was not a bona fide partner in the Portland and Seattle partnerships, and accordingly included in the income of the petitioner E. Royce the partnership profits reported by her.

We conclude that Dora F. Royce was not a bona fide member of the Portland and Seattle partnerships during the taxable years for income tax purposes.

Opinion

The question is whether, in the years involved, Dora was, for tax purposes, a member of the Portland and Seattle partnerships.

As was said by the Supreme Court in *Commissioner v. Culbertson*, 337 U.S. 733, with regard to the bona fides of a family partnership:

The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard * * * but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. * * *

In the earlier case of *Commissioner v. Tower*, 327 U. S. 280, the same Court had said that where, as here, the validity of an alleged partnership is challenged by an outsider, there arises the question of whether the parties involved “really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their ‘agreement, considered as a whole,

and by their conduct in execution of its provisions.' " *Commissioner v. Tower*, supra, at page 287.

It is true that the parties went through the formalities of making Dora a partner in both firms.

Adequate written agreements were drawn up and signed by all the purported partners. The capital given her by her husband (with the understanding and implied condition that it be invested in the partnerships) was turned in. Dora performed certain relatively inconsequential services for the Portland firm, similar services for the Seattle partnership being performed by an employee. Distributions of profits were made to her in large amounts.

However, the checks covering the distributions were endorsed in blank either by Dora or by Dora and her husband and were used to pay income taxes or were largely invested by the husband in various projects in which he was interested. Although E. Royce filed a gift tax return covering the purported gift to Dora of stock in the Seattle corporation (also covering the gift to the trust subsequently herein discussed), there is no evidence that such a return was filed covering the purported gift of the Portland corporation stock. Inconsistent with her testimony that she performed important services are the statements or the pregnant omissions in certain of the partnership returns signed and sworn to by E. Royce indicating that Dora performed no services for the partnerships.

We have carefully studied these facts and all the facts pertinent to the issue against the background in which they appear and in the light of the cri-

teria set out by the Supreme Court, and have come to the conclusion that the parties involved at no time really and truly intended Dora to be a bona fide partner in carrying on the business of the Portland and Seattle partnerships. We have accordingly so found as a fact and here so hold.

Issue 5

Findings of Fact

The Declaration of Trust executed by E. Royce on April 20, 1944, and above referred to, provided, in part, as follows:

That I, Ezra Royce, of Portland, Multnomah County, Oregon, do hereby declare that I am the sole and absolute owner of the following described personal property in my own right, but do declare that I hold the same henceforth from date hereof, in trust and upon the trusts herein declared and created, for the benefit of my beloved daughter, Eunice M. Royce; and others hereinafter named:

Seven Hundred (700) shares of the common capital stock of The Yellow Cab Company of Seattle, represented by Certificate No. 23.

The Purpose and the Terms and Conditions upon which I hereby declare that I, as trustee, hold the above-described property in trust are as follows:

(1) To collect the net income therefrom and to pay the same over to my said daughter, or to accumulate the same for her use and benefit, and invest and reinvest the same as hereinafter provided for principal of the trust estate, and as her absolute and separate property for and during the term of

her natural life, or until this trust is sooner terminated by my death or otherwise, as hereinafter provided for.

(2) I, as such trustee hereunder, am to have and there is hereby reserved to and vested in me full discretionary power and authority to sell or exchange from time to time, all of the aforesaid property or any part thereof, or any other property belonging to this trust, and to buy any other property, upon such terms, for such price, or for such property as in my discretion I shall see fit; and the proceeds so received upon such sale or exchange shall be invested or reinvested in such securities or other properties as I may deem advisable, all of same to be held upon the same trusts as are hereinabove and hereinafter declared.

(3) In the event that it shall appear to me at any time or times that the personal or family necessities of my said daughter require a payment or payments of money to her, then in my sole discretion, I may pay over to her, and there is hereby reserved to me the power and authority to pay over to her, such portion of the corpus of the said trust estate as I may deem necessary or proper; without first applying any net income or accumulated net income therefor, and in such event, any such payments may be treated by me, at my election, as trustee, as if an absolute gift had been made herein of such corpus or portions thereof to my said daughter, or as a loan to be repaid to the trust estate by her, either from future income or otherwise.

(4) This Trust shall be irrevocable, with no power reserved to alter, amend, cancel, revoke or terminate the same, except as may otherwise herein be provided.

* * * * *

(6) I, alone, hereby reserve the right and power, during my lifetime to nominate and appoint a successor trustee, to carry out the provisions of this trust, in my place and stead, such appointment to take effect either during my lifetime or at my death, as I may direct, by the execution of a formal document designating such successor trustee, but the exercise of such power shall not exhaust the power or extend the term of the Trust. Any such appointment shall be completed upon the turning over and delivery to such successor trustee of the Trust property and estate.

(7) Should I at any time become incapacitated to administer this trust, or upon my death, in default of the appointment of another trustee by me, my wife, Dora F. Royce, my brother, B. Royce and A. L. Schneider shall act as co-trustees in my place and stead, each of said co-trustees to have an equal voice in the management of said estate, and such successor trustees are hereby directed to pay to my said daughter monthly or quarterly during her lifetime, beginning with the date of my death, so much of the net income of the trust estate after paying costs and charges as may be necessary to meet the schooling, living and other needs and desires of my said daughter as she may direct.

In the event the annual income from the trust

estate in any year, before or after my death, shall fall below \$2,000.00, and it shall appear to the trustee or trustees that the personal or family needs of my said daughter shall require a payment or payments of money in addition to the income from the trust property, the trustee or trustees in his or their discretion may pay over to my said daughter, and it is hereby reserved to such trustee or trustees the power and authority to pay over to her, such portion of the principal of the trust estate as may be necessary to pay to my said daughter sums which shall aggregate, at least, the sum of \$2,000.00. This provision is not intended to limit the payments to my said daughter, but to enlarge the powers otherwise granted in this instrument.

(8) Before making any investment, change of investment, or sale of any property or securities in the trust fund, the trustee or trustees who succeed me and their successors shall consult and advise with my said daughter, Eunice M. Royce, and, if the said Eunice M. Royce shall fail to indicate her disapproval of any proposed investment, change of investment, or sale, within fifteen (15) days after notice thereof, the trustees, if they deem the same advisable, may make such investment, change of investment or sale, without such approval.

(9) Upon my said daughter reaching the age of thirty-five (35) years, if, in the judgment of the trustee or trustees then living, my said daughter desires to receive the corpus of the trust estate and she is considered by the said trustee or trustees to be capable of managing the trust estate wisely, then, and upon the concurrence of these two

events, the trustee or trustees shall convey the corpus of this trust to my said daughter in her absolute right. If, in the judgment of the trustee or trustees my said daughter is not capable of managing the trust estate wisely when she reaches the age of thirty-five (35) years, then as soon thereafter as she convinces the trustee or trustees of her ability to manage said estate wisely, said trust property shall be conveyed to her absolutely.

* * * * *

In Witness Whereof, I have hereunto set my hand and seal this 4/20/44 [sic] day of April, 1944.

[Seal] /s/ Ezra Royce.

E. Royce never regarded the Declaration of Trust as a real trust, nor did he treat it as such during the ensuing years. He did not file fiduciary income tax returns for the trust. He made no accounting to Eunice, nor has he ever reported to her in respect to the status of the trust. He filed income tax returns in the name of Eunice M. Royce for the years 1944 and 1946 to 1949, inclusive. He signed her name "Eunice Mae Royce," or "E. M. Royce, by E. Royce, Trustee," on the returns. He so filed an unsigned Form 1040 for 1945. Eunice became 18 years old in 1947. She lived at home until then. From 1947 to 1951 she went to the University of Oregon. From March 1952 to March 1954, Eunice worked for the Imperial Travel Bureau. She was married June 12, 1954. She is now Eunice Dodge and resides at Wenatchee, Washington. At the time of the hearing she was 26 years of age. Eunice was first told about the trust when she was 18 years of age.

During the years in question, substantially the only income reported on the returns filed in the name of Eunice Royce represented those earnings of the partnership distributable to "E. Royce, trustee for E. M. Royce," as follows:

Year	Amount
1945.....	\$47,797.11
1946.....	54,826.23
1947.....	47,645.90
1948.....	20,863.27
1949.....	16,611.08

The drawing account of "E. Royce, trustee for E. M. Royce," on the books of the Seattle partnership disclosed withdrawals aggregating \$205,154.94 during the period from January 1, 1944, to December 31, 1949, as follows:

Year	Amount
1944.....	\$ 16,422.49
1945.....	77,422.49
1946.....	46,922.49
1947.....	34,192.49
1948.....	21,462.49
1949.....	8,732.49

Total..... \$205,154.94

On December 31, 1949, the earnings distributable to "E. Royce, trustee for E. M. Royce," exceeded the withdrawals by \$32,592.59. The excess amount had been retained in the business and not withdrawn.

The foregoing withdrawals were deposited by E. Royce in a trust account at The U. S. National Bank. E. Royce, alone, was authorized to sign checks on this account. He has exercised absolute

discretionary power and authority over the funds and, excepting for certain small amounts, Eunice has never received anything from the trust. The checks issued by E. Royce on the trust account during the period from January 1, 1944, to December 31, 1949, aggregated \$186,046.21, leaving a balance in the account of \$19,108.73. These funds were directed to the following purposes:

Payment of Federal and state taxes....	\$ 89,464.96
Purchase of Government bonds.....	281.25
Payment of personal expenses of	
Eunice Royce	2,200.00
Loans to or for E. Royce.....	94,100.00
Balance left in account.....	19,108.73
<hr/>	
Total.....	\$205,154.94

During the years involved, Eunice had a personal checking account in The First National Bank, to which E. Royce sometimes deposited small amounts drawn from the trust account for certain personal expenses of Eunice while she attended college. Such deposits were as follows:

Date	Amount
December 1, 1947.....	\$ 200.00
March 4, 1948.....	300.00
June 15, 1948.....	300.00
June 20, 1949.....	300.00
September 23, 1949.....	300.00
October 27, 1949.....	300.00
Check No. 20.....	200.00
Check No. 35.....	300.00
<hr/>	
Total.....	\$2,200.00

The sole investment of trust funds in Governmental or other conventional securities amounted to \$281.25. This investment consisted of three checks drawn on the trust account in 1944 and 1945, made payable to "Yellow Cab Co.," as follows:

Date of Check	Amount
December 9, 1944.....	\$ 75.00
May 17, 1945.....	75.00
November 29, 1945.....	131.25
<hr/>	
Total	\$281.25

The "loans" to E. Royce from the trust account aggregated \$94,100 on December 31, 1949. Of this amount, \$7,100 was loaned to Royce, Inc., and the balance of \$87,000 to E. Royce, personally. Royce, Inc., owned the Columbia Athletic Club building, and E. Royce was principal stockholder of the corporation. The loans to Royce, Inc., were made in 1948 and 1949, and were repaid in 1950. The loans to E. Royce consisted of three checks drawn on the trust account at the time and in the amounts indicated below:

Check No.—Date of Check	Amount
6 Between June 15 and July 10, 1945	\$60,000.00
10 December 29, 1945.....	25,000.00
15 July 10, 1946	2,000.00
<hr/>	
Total.....	\$87,000.00

These loans have not been repaid, and are now evidenced by three renewal notes bearing 3 per cent interest, the original notes having been canceled.

These renewal notes are 1-year notes made payable to Eunice Mae Royce. The dates of execution, face amounts and other data shown thereon are as follows:

Date of Execution	Amount of Note	Repayment— Amount & Date
July 10, 1951	\$ 2,000	\$ 200. (6-18-53) 500. (5- 5-53) 230. (5- 7-54) 85. (9-26-53)
July 7, 1952	60,000	3,500. (1-13-54) 1,000. (2-15-54)
December 26, 1953 . .	25,000	None
	<hr/> \$87,000	<hr/> \$5,515.

No interest has been paid and, aside from the above payments, the loans to E. Royce from the trust account remain unpaid to date.

Respondent determined that Eunice Royce was not a bona fide partner in the partnership and accordingly included in the income of the petitioner E. Royce the partnership profits in the returns filed in her name.

E. Royce and the other parties involved did not in good faith and acting with a business purpose intend to join together with Eunice or with the trust of which she was beneficiary as partners in the conduct of the Seattle partnership.

Opinion

This issue involves Docket Nos. 51526 and 51527 and presents the question of whether Eunice or the

trust of which she was beneficiary was a member, for tax purposes, of the Seattle partnership during the taxable years.

Here, again, the same criteria are to be employed in determining the true intent of the parties concerned, as in the preceding issue. *Commissioner v. Culbertson*, *supra*. Having thus considered all of the facts and circumstances found on this record which bear upon the intent of the parties, we have found as a fact that they did not in good faith and acting with a business purpose intend to join together with Eunice or the trust of which she was beneficiary as partners in the present conduct of the Seattle partnership. Such finding resolves the issue here before us. A detailed recital of the facts upon which our conclusion is based would serve no useful purpose. Suffice it to say, such facts do not materially differ from those found in such cases as *Herman Feldman*, 14 T.C. 17, *affd.* 186 F. 2d 87; *Lyman A. Stanton*, 14 T.C. 217, *affd.* 189 F. 2d 297; *Stanback v. Robertson*, 183 F. 2d 889; *Zander v. Commissioner*, 173 F. 2d 624, affirming a Memorandum Opinion of this Court; and *Economas v. Commissioner*, 167 F. 2d 165, affirming a Memorandum Opinion of this Court, wherein it was held that a trust under the circumstances there present was not a bona fide partner in the business enterprises respectively involved and that the parties did not so intend. Cf., also, *Joseph J. Morrison*, 11 T.C. 696, *affd.* 177 F. 2d 351; *T. Edward Ritter*, 11 T.C. 234, *affd.* 174 F. 2d 377; *Elwin S. Bentley*, 14 T.C. 228, *affd.* 184 F. 2d 668. The factual situation here can-

not be satisfactorily distinguished from those in the cited cases and the rationale employed therein is equally apposite here whether we consider the trust created by E. Royce, or Eunice individually, as the entity involved. On the other hand, Thomas H. Brodhead, 18 T.C. 726, *affd.*, 210 F. 2d 652; and Theodore D. Stern, 15 T.C. 521, cited and relied upon by petitioners, are clearly distinguishable on their facts and are of no application here.

There was no substantial change made in the economic position of E. Royce or in the management and control of the Seattle partnership. The capital donated by E. Royce to himself as trustee and then, in turn, to the Seattle partnership was part of that which he had previously employed in the business. The conduct of the business remained unchanged. Under the trust instrument, E. Royce retained broad powers as trustee to control, manage and invest the trust corpus as he should see fit. He kept substantially the same control over the property as he had previously exercised. The income of the trust was to be accumulated or distributed to Eunice as he, in his sole discretion, saw fit. The fact is that a very small percentage of the earnings distributed to the trust was ever distributed to Eunice or invested in Governmental or other conventional securities for her. The bulk of such distributions, after they were applied in payment of taxes, was "loaned" to or "invested" by E. Royce in various projects in which he was interested with no more apparent restraint than there would have been had the trust never been declared.

Respondent's determination as to this point is sustained.

Issue 6

Findings of Fact

The Portland partnership reported the sale of 76 used taxicabs in the capital gains section of its income tax return for 1947. The cabs sold were certain model 1941 and 1942 Plymouth sedans which had been used by the partnership during the war period. The cabs were repainted and prepared for sale to the public in the garage of the partnership.

Niederkrone, the accountant for the Portland partnership, reported used cab sales in the Monthly Car Record on the basis of information furnished him by E. Royce. E. Royce was actively in charge of used cab sales in 1947. In accounting to the partnership, E. Royce followed the practice of turning over to Niederkrone an amount of currency representing the net proceeds from a sale, together with information identifying the cab by company and motor number. Information concerning the name of the purchaser, the price paid by the purchaser, the amount of commission or any other expense of sale was not furnished to Niederkrone. The amounts shown by Niederkrone on the records and returns of the partnership represented net figures or the balances of proceeds which remained from sales after E. Royce had deducted commission, expenses and other items known only to him.

E. Royce sold at least 29 cabs in 1947 through James D. Hamilton, used car dealer, Portland, Oregon. Although E. Royce would always accept checks,

both Hamilton and E. Royce preferred to deal in cash, and the payments made by Hamilton were mostly in cash. Frequently it was necessary for Hamilton to cash his own checks, so as to enable him to make payment to E. Royce in currency. E. Royce paid Hamilton a commission of \$100 for every cab sold by him. This arrangement was terminated in April 1949. Hamilton kept records consisting primarily of "deal" envelopes on which information concerning each cab was shown, including motor number, make and model of car, certificate of title, purchaser, sales price and the amount paid to E. Royce. The amount paid to E. Royce was shown as a net figure on the records, that is, after commission and other expenses, if any, were deducted from the sales price. The deal envelopes kept by Hamilton were examined by respondent's agents. They disclosed 29 cab sales, and complete information was available concerning 14 cabs. These records were subsequently destroyed or lost.

Pertinent data concerning the 14 cabs sold on consignment through Hamilton follows:

Cab No.	Net Payment to E. Royce	Amount Reported by Partnership
77	\$ 795.00	\$ 700.00
16	800.00	695.00
67	800.00	700.00
37	800.00	600.00
56	700.00	625.00
96	850.00	650.00
48	845.00	665.00

Cab No.	Net Payment to E. Royce	Amount Reported by Partnership
95	800.00	690.00
17	895.00	690.00
94	895.00	690.00
22	895.00	650.00
64	895.00	695.00
69	895.00	695.00
50	775.00	700.00
<hr/>		<hr/>
Total. . . .	\$11,640.00	\$9,445.00

E. Royce sold at least 47 cabs in 1947 to purchasers other than Hamilton. Of these sales the examining officers were able to trace 14 to the purchasers. E. Royce sold 8 cabs through his salesman, Reed Lovelace, who received a commission for each cab sold. The remaining 6 cabs were sold to purchasers on the floor of the partnership garage.

Johnson Auto Company, a partnership engaged in the used car business, Portland, Oregon, purchased 6 cabs. Payment was made with 4 checks payable to Reed Lovelace. Check Nos. 118 and 427 in the amounts of \$725 and \$1,500, respectively, were endorsed by Lovelace to Yellow Cab Company. Check No. 443, in the amount of \$2,550, was endorsed in blank by Lovelace to E. Royce. Check No. 442, in the amount of \$75, was in payment of Lovelace's commission and was cashed by him. Leo Overroedder purchased 2 cabs. Payment was made by check in the amount of \$1,500 payable to Lovelace and endorsed by him to E. Royce. The remaining 6

sales were made to Ward Motor Company, Ronald McKenzie and William Bieker on the floor of the partnership garage after examination by the purchasers. Ward Motor Company, engaged in the business of selling automobiles in Bend, Oregon, purchased 4 cabs. The purchase was made by W. L. Pierce, sales manager. Payment was made with two checks totaling \$3,200 payable to Pierce, endorsed by him to E. Royce. Bieker, a school teacher, Estacada, Oregon, and McKenzie, a police detective, Portland, Oregon, each purchased a cab. Bieker purchased his from the shop foreman. The cab sold to McKenzie was repainted and had new bumpers installed. Bieker paid by check in the amount of \$900, payable to Yellow Cab Company. McKenzie paid \$900 in currency to Yellow Cab Company.

Pertinent data concerning the foregoing 14 cabs are as follows:

Cab No.	Purchaser	Sales Price per Purchaser	Amount
			Reported by Partnership
54	Johnson Auto Co.	\$ 700.00	\$ 625.00
61	Johnson Auto Co.	725.00	650.00
75	Johnson Auto Co.	725.00	650.00
59	Johnson Auto Co.	850.00	665.00
73	Johnson Auto Co.	850.00	665.00
76	Johnson Auto Co.	850.00	690.00
62	Leo Overroedder	750.00	650.00
86	Leo Overroedder	750.00	650.00
18	Ward Motor Co.	800.00	700.00
42	Ward Motor Co.	800.00	700.00
83	Ward Motor Co.	800.00	700.00
85	Ward Motor Co.	800.00	700.00
23	Wm. E. Bieker	900.00	700.00
34	Ronald E. McKenzie	900.00	625.00
Total		\$11,200.00	\$9,370.00

E. Royce concluded in 1949 that he had also failed to account to the Portland partnership for cab sales in the amount of \$14,100. Of that amount, E. Royce received \$5,100. The remaining \$9,000, relating entirely to sales made in 1948, he has never received from Hamilton. The examining agents were unable to trace the sales, or to allocate them properly according to the year or years in which made, but took them into account in arriving at the estimated understatement for the year 1947 of \$15,000. One year later, on April 6, 1950, E. Royce turned over the above-mentioned \$5,100 to Niederkrome with instructions to record it on the books of the partnership. Niederkrome debited the amount of \$5,100 to the cash journal and credited a like amount to an account No. 5091 entitled "Depreciation Adjustment." E. Royce has never accounted to the partnership for the remaining \$9,000 in cab sales, and these sales remain unrecorded on the partnership books and unreported in its tax returns.

The sales of used taxicabs by the Portland partnership in 1947 were understated in the net aggregate amount of \$4,525.

Opinion

This issue involves Docket Nos. 51527 and 51528. The question in dispute is whether the Portland partnership understated its reported sales of used taxicabs in the year 1947 and, if so, the amount thereof. Respondent determined that there was

such understatement and in the amount of \$15,000.

Petitioners attack respondent's action as being no more than an arbitrary estimate based upon an equally arbitrary assumption having no real basis in fact. Petitioners would thus have us expunge the deficiency determined by respondent in its entirety, under the rule of *Helvering v. Taylor*, 293 U.S. 507. In the alternative, while emphatically denying any understatement, petitioners maintain that if there was such, it could in no event have exceeded \$2,825.

Respondent admits that the actual amount of understatement determined by him was an estimated sum computed on a basis of an average understatement of \$200 for each of the 76 cabs sold by the Portland partnership in 1947. The average thus used and the total understatement determined were arrived at, says respondent, after the sales of 28 cabs, the only ones concerning which any records could be found, were analyzed and evidence bearing upon the \$14,100 in cab sales admittedly unaccounted for by E. Royce was "taken into account."

The facts found on this record show clearly that the difference in the amount received for the 28 cabs, the sales of which were analyzed by respondent, and the amounts recorded and reported by the Portland partnership averaged substantially less than the \$200 used by respondent in arriving at his determination. In this connection, petitioners have adduced evidence showing that approximately \$100 per cab sold was paid out by way of commissions

to those effecting the sales; that on many occasions other amounts were spent for repainting and repairing the cabs sold; and that it was the standard practice of the Portland partnership to record and report only the net amounts realized from these sales. It seems clear, however, that on several sales all such expenses were deducted prior to any payment being made to the Portland partnership and there was a further write-down in the amount reported.

With respect to the \$14,100 of unaccounted for sales, we have found that \$9,000 thereof has never been received by E. Royce or the Portland partnership but still remains unpaid and that, in any event, such amount represents sales consummated entirely in 1948. As to the remaining \$5,100, the receipt of which by E. Royce is admitted, there is no evidence specifically showing what part is properly allocable to 1947 sales, but a fair inference to be drawn from all the testimony bearing on the point is that some portion of the \$5,100 in question does in fact properly belong to sales effected in that year.

Thus, in recapitulation, while we agree with petitioners that respondent's determination is excessive in amount, we do not agree that the determination of understatement of 1947 sales is, in itself, on the record made, without foundation in fact.

Viewing all the evidence and considering all inferences therefrom, we have come to the conclusion that the Portland partnership's sales of used taxi-

cabs in 1947 were understated in the aggregate amount of \$4,525. Accordingly, we have so found as a fact and here so hold.

Decisions will be entered under Rule 50.

Served and Entered Nov. 16, 1956.

The Tax Court of the United States
Washington

Docket No. 51491.

FRED C. NIEDERKROME, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the year 1945 there is a deficiency in income tax in the amount of \$32,348.48 and in addition to tax (Sec. 294(d)(2), Internal Revenue Code of 1939) in the amount of \$1,940.07.

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

The Tax Court of the United States
Washington

Docket No. 51526.

E. ROYCE and DORA F. ROYCE,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the years 1948 and 1949 there are deficiencies in income tax in the amounts of \$22,191.08 and \$22,453.94, respectively.

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

The Tax Court of the United States
Washington

Docket No. 51527.

EZRA ROYCE, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the years 1944, 1945, 1946 and 1947, there are deficiencies in income tax and addition to tax (Sec. 294(d)(2), Internal Revenue Code of 1939), as follows:

Year	Deficiency Income Tax	Addition to Tax Sec. 294(d)(2)
1944	\$ 54,875.50	
1945	269,786.82	
1946	127,263.95	
1947	76,771.18	\$4,882.58

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

The Tax Court of the United States
Washington

Docket No. 51528.

B. ROYCE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the years 1945 and 1947 there are deficiencies in income tax in the amounts of \$17,795.86 and \$5,051.44, respectively.

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

The Tax Court of the United States
Washington

Docket No. 51529.

ESTATE OF ISABELLE H. ROYCE, Deceased,
B. ROYCE, Executor, Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the years 1945, 1946 and 1947 there are deficiencies in income tax as follows:

Year	Deficiency
1945	\$29,308.54
1946	9,774.80
1947	5,051.44

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

The Tax Court of the United States
Washington

Docket No. 51531.

ROBERT T. JACOB and AGNES C. JACOB,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the year 1945 there is a deficiency in income tax in the amount of \$66,977.56 and an addition to tax (Sec. 294(d) (2), Internal Revenue Code of 1939) in the amount of \$4,035.66.

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

The Tax Court of the United States
Washington

Docket No. 51533.

ALBERT L. SCHNEIDER and BERTHA
SCHNEIDER, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion filed November 16, 1956, the parties herein having filed an agreed computation of tax on March 27, 1957, it is

Ordered and Decided: That for the years 1945, 1948 and 1949, there are deficiencies in income tax and addition to tax (Sec. 294(d)(2), Internal Revenue Code of 1939), as follows:

Year	Deficiency Income Tax	Addition to Tax (Sec. 294(d)(2))
1945	\$21,157.87	\$1,102.38
1948	1,738.04	
1949	555.06	

Entered April 2, 1957.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Served and Entered April 3, 1957.

In The United States Court of Appeals
For The Ninth Circuit

Tax Court Docket No. 51491

FRED C. NIEDERKROME, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Fred C. Niederkrome, by his attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and deciding that there is a deficiency in petitioner's income tax for the calendar year 1945.

The controversy presents the question whether any amount paid in 1945 by Oregon Motor Stages to L. R. Bentson, in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, or any incidental disbursements paid by Oregon Motor Stages constituted a taxable dividend to petitioner.

Petitioner is an individual residing in Portland, Oregon. Petitioner filed his income tax return for the period here involved with the Collector of Internal Revenue for the District of Oregon at Port-

land, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioner files this petition pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,
/s/ RANDALL S. JONES,
/s/ EBERHARD P. DEUTSCH,
Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed July 1, 1957.

[Title of Court of Appeals and Tax Court Docket
No. 51526.]

PETITION FOR REVIEW

E. Royce and Dora F. Royce, by their attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petition the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and deciding that there is a deficiency in petitioners' income taxes for the calendar years 1948 and 1949.

The controversy presents the question whether during the years in issue petitioners were taxable with respect to the income of a partnership, doing business as Yellow Cab Company in Seattle, Washington, which was distributable to a trust for the

benefit of Eunice M. Royce, the daughter of petitioners.

Petitioners are husband and wife residing in Portland, Oregon. Petitioners filed their income tax returns for the periods here involved with the Collector of Internal Revenue for the District of Oregon at Portland, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioners file this petition pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,
/s/ RANDALL S. JONES,
/s/ EBERHARD P. DEUTSCH,
Counsel for Petitioners.

[Endorsed]: T. C. U. S. Filed July 1, 1957.

[Title of Court of Appeals and Tax Court Docket
No. 51527.]

PETITION FOR REVIEW

Ezra Royce, by his attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and deciding that there is a deficiency in petitioner's income tax for the calendar years 1944 through 1947.

The controversy presents the following questions: (1) whether any amount paid in 1945 by Oregon Motor Stages to L. R. Bentson, in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, or any incidental disbursements paid by Oregon Motor Stages constituted a taxable dividend to petitioner; (2) whether during the years in issue petitioner was taxable with respect to the income of a partnership, doing business as Yellow Cab Company in Portland, Oregon, which was distributable to Dora F. Royce, the wife of petitioner; (3) whether during the years in issue petitioner was taxable with respect to the income of a partnership, doing business as Yellow Cab Company in Seattle, Washington, which was distributable to the said Dora F. Royce; (4) whether during the years in issue petitioner was taxable with respect to the income of a partnership, doing business as Yellow Cab Company in Seattle, Washington, which was distributable to a trust for the benefit of Eunice M. Royce, the daughter of petitioner; and (5) whether the sum of \$20,000 disbursed by Hippodrome Amusement Company to petitioner in 1945 was taxable to him as a dividend.

Petitioner is an individual residing in Portland, Oregon. Petitioner filed his income tax returns for the periods here involved with the Collector of Internal Revenue for the District of Oregon at Portland, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioner files this petition pursuant to the pro-

visions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,
/s/ RANDALL S. JONES,
/s/ EBERHARD P. DEUTSCH,
Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed July 1, 1957.

[Title of Court of Appeals and Tax Court Docket
No. 51528.]

PETITION FOR REVIEW

B. Royce, by his attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and deciding that there is a deficiency in petitioner's income tax for the calendar year 1945.

The controversy presents the question whether any amount paid in 1945 by Oregon Motor Stages to L. R. Bentson, in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, or any incidental disbursements paid by Oregon Motor Stages constituted a taxable dividend to petitioner.

Petitioner is an individual residing in Santa Barbara, California. He resided in Vancouver, Washington immediately prior to establishing his said present residence in California. Petitioner filed his income tax return for the period here involved with the Collector of Internal Revenue for the District

of Washington at Tacoma, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioner files this petition pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,
/s/ RANDALL S. JONES,
/s/ EBERHARD P. DEUTSCH,
Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed July 1, 1957.

[Title of Court of Appeals and Tax Court Docket
No. 51529.]

PETITION FOR REVIEW

The Estate of Isabelle H. Royce, deceased, B. Royce, Executor, by its attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and deciding that there is a deficiency in income tax of deceased Isabelle H. Royce for the calendar year 1945.

The controversy presents the question whether any amount paid in 1945 by Oregon Motor Stages to L. R. Bentson, in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, or any incidental disbursements paid by Oregon Motor

Stages constituted a taxable dividend to deceased Isabelle H. Royce.

Petitioner is an estate. B. Royce, the executor of the said estate, resides in Santa Barbara, California. He resided in Vancouver, Washington, immediately prior to establishing his said present residence in California. Deceased Isabelle H. Royce filed her income tax return for the period here involved with the Collector of Internal Revenue for the District of Washington at Tacoma, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioner files this petition pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,

/s/ RANDALL S. JONES,

/s/ EBERHARD P. DEUTSCH,

Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed July 1, 1957.

[Title of Court of Appeals and Tax Court Docket
No. 51531.]

PETITION FOR REVIEW

Robert T. Jacob and Agnes C. Jacob, by their attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petition the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and

deciding that there is a deficiency in petitioner's income tax for the calendar year 1945.

The controversy presents the question whether any amount paid in 1945 by Oregon Motor Stages to L. R. Bentson, in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, or any incidental disbursements paid by Oregon Motor Stages constituted a taxable dividend to petitioners.

Petitioners are husband and wife residing in Portland, Oregon. Petitioners filed their income tax return for the period here involved with the Collector of Internal Revenue for the District of Oregon at Portland, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioners file this petition pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,
/s/ RANDALL S. JONES,
/s/ EBERHARD P. DEUTSCH,
Counsel for Petitioners.

[Endorsed]: T.C.U.S. Filed July 1, 1957.

[Title of Court of Appeals and Tax Court Docket
No. 51533.]

PETITION FOR REVIEW

Albert L. Schneider and Bertha Schneider, by their attorneys Louis Eisenstein, Randall S. Jones and Eberhard P. Deutsch, hereby petition the

United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on April 2, 1957, ordering and deciding that there is a deficiency in petitioners' income tax for the calendar year 1945.

The controversy presents the question whether any amount paid in 1945 by Oregon Motor Stages to L. R. Bentson, in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, or any incidental disbursements paid by Oregon Motor Stages constituted a taxable dividend to petitioners.

Petitioners are husband and wife residing in Clackamas County, Oregon. Petitioners filed their income tax return for the period here involved with the Collector of Internal Revenue for the District of Oregon at Portland, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Petitioners file this petition pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS EISENSTEIN,
/s/ RANDALL S. JONES,
/s/ EBERHARD P. DEUTSCH,
Counsel for Petitioners.

[Endorsed]: T.C.U.S. Filed July 1, 1957.

[Title of Tax Court and Docket Nos. 51491, 51526, 51527, 51528, 51529, 51531, 51533.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents 1 to 43 inclusive, constitute and are all of the original papers on file in my office as called for by the Designation of Record on Review, except the original exhibits which are separately certified, in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court cases have filed petitions for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of September, 1957.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

No. 15724

United States
Court of Appeals
for the Ninth Circuit

FRED C. NIEDERKROME, E. ROYCE, DORA
F. ROYCE, EZRA ROYCE, B. ROYCE,
ESTATE OF ISABELLE H. ROYCE, DE-
CEASED, B. Royce, Executor, ROBERT T.
JACOB, AGNES C. JACOB, ALBERT L.
SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 313 to 630, inclusive)

Petitions to Review Decisions of The Tax
Court of the United States

FILED

No. 15724

United States
Court of Appeals
for the Ninth Circuit

FRED C. NIEDERKROME, E. ROYCE, DORA
F. ROYCE, EZRA ROYCE, B. ROYCE,
ESTATE OF ISABELLE H. ROYCE, DE-
CEASED, B. Royce, Executor, ROBERT T.
JACOB, AGNES C. JACOB, ALBERT L.
SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 313 to 630, inclusive)

Petitions to Review Decisions of The Tax
Court of the United States

In The Tax Court of the United States

Docket Nos. 51491, 51526, 51527, 51528, 51529,
51530, 51531, 51532, 51533, 51534

FRED C. NIEDERKROME; E. ROYCE AND
DORA F. ROYCE; EZRA ROYCE; B.
ROYCE; ESTATE OF ISABELLE H.
ROYCE, DECEASED, ET AL; B. ROYCE
AND ESTATE OF ISABELLE H. ROYCE,
DECEASED, ET AL; ROBERT T. JACOB
AND AGNES C. JACOB; ALBERT L.
SCHNEIDER; ALBERT L. SCHNEIDER
AND BERTHA SCHNEIDER; BERTHA
SCHNEIDER, Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Courtroom, U. S. Court of Appeals,
U. S. Court House, Portland, Oregon.

Monday, May 9, 1955.

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 10:12 o'clock a.m.

Before: Honorable Ernest H. Van Fossan, J.,
Presiding.

Appearances: Mr. Randall S. Jones and Mr. R. T. Jacob, Portland, Oregon, for the Petitioners.

Mr. John D. Picco, Bureau of Internal Revenue,
Portland, Oregon, for the Respondent. [1]*

* * * * *

ROBERT T. JACOB

a witness called on behalf of the Petitioners, first
having been duly sworn, testified as follows:

The Clerk: Will you please state your name and
address for the record?

The Witness: Robert T. Jacob, Portland——
(interrupted) [27]

The Clerk: Robert E. Jacob?

The Witness: Robert T. J-a-c-o-b, Portland,
Oregon.

Direct Examination

Q. (By Mr. Jones): Mr. Jacob, how long have
you been a resident of Portland, Oregon?

A. About forty years.

Q. And you are married, and your wife's name
is what please? A. Agnes C. Jacob.

Q. And you and Mrs. Jacob are the Petitioners
in Docket Number 51531, involved at this trial?

A. That is correct.

The Court: Mr. Jones; Mr. Jones, if you will
kindly indicate if you can, at each breaking point,
where the testimony is to be applied—which issue.

Mr. Jones: The testimony of this witness will
be pertain—pertain solely and exclusively to the
main issue, the issue of the Oregon Motor Stage
stock purchase and redemption.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

(Testimony of Robert T. Jacob.)

The Court: Bear that in mind throughout the case.

Mr. Jones: Yes, thank you very much.

Q. What is your occupation, Mr. Jacob?

A. I am an attorney.

Q. And you are an attorney—attorney admitted to practice in the Courts of Oregon for a good many years?

A. Since 1926. [28]

Q. Now—I am trying to, your Honor, keep from applying the facts which I think we have stipulated—those which are asked as evidence, so I am skipping something here—were you interested with other people in acquiring some of the stock of the Oregon Motor Stages in the year 1945?

A. I was.

Q. Would you name who those parties were?

A. They were E. Royce, B. Royce, F. C. Niederkrome, A. L. Schneider, L. R. Bentson—B-e-n-t-s-o-n, and myself.

Q. Now, E. Royce is also called sometimes Ezra Royce or Roy Royce, is that right?

A. That is correct.

Q. And B. Royce is sometimes called—his name is Barney Royce?

A. Bonnie, yes. He is called Barney, but his name is Bonnie, B-o-n-n-i-e.

Q. Now, would you please tell us about the negotiations for the purchase of that stock which you were interested in?

A. Sometime in April or May of 1945, Mr. Schneider learned of the fact that this stock of

(Testimony of Robert T. Jacob.)

Oregon Motor Stages was for sale. He contacted the then owners of the stock, and communicated the fact to Mr. E. Royce that the stock was for sale, and from then on, Mr. Royce and he started to talking to different individuals about purchasing some of the stock, and I was one of the group who was interested in buying the stock, and as a result, agreed to take a hundred shares of [29] the —of the stock, along with others who were planning on acquiring other shares.

Q. Now, how many shares did the group, except for Mr. Bentson, expect to talk about?

A. We expected and wanted to buy only four hundred shares.

Q. And what were you going to do about the other three hundred and fifty shares?

A. Originally, we discussed with Mr. Frank McColloch, the attorney for the selling group, the matter of giving the corporation an option to acquire these shares, and he drafted a form of agreement, in that direction. Then, too, we were—we were discussing the matter of acquiring additional shares with other individuals, and while—during the time that these matters were pending, Mr. L. R. Bentson, of Vancouver, B. C., came to Portland and he expressed an interest in acquiring some of the shares.

Q. Now, before we go into Mr. Bentson's arrival here, who were some of the people that you were discussing this with to take some of the three fifty?

(Testimony of Robert T. Jacob.)

A. Mr. A. H. Wenck of Seattle, and Mr. Lance Rothchild of San Francisco.

Q. And were they men of sufficient means so that they could have done so?

A. They were men of considerable means. Mr. Rothchild particularly was a very wealthy man.

Q. And then when did you first meet Mr. Bentson yourself? [30]

A. I met him sometime during the middle or latter part of June, 1945. I met him at the home of Mr. Royce—E. Royce.

Q. And what kind of an appearing man was Mr. Bentson?

A. Mr. Bentson made a very good appearance. He was a man—very intelligent and alert at that time, and I was quite impressed with his stability. I was informed that he had been a successful mining operator in Alaska; that he had taken from a gold mine—placer gold mine, something in excess of eight hundred thousand dollars, and his dress and appearance was that of a very substantial sort of man.

Q. Well, after you met him, how did you learn through—how did you learn that he would be interested in acquiring any of the stock of the Portland—or of the Oregon Motor Stages?

A. Well, he had been in Portland, I think, some days when I met him, and he told me that he had been discussing this proposition with Mr. Royce—Mr. E.—well, probably with both E. and B. Royce,

(Testimony of Robert T. Jacob.)

but anyway, he said he had been discussing it, and he was interested in acquiring the stock.

Q. Was there any discussion between you and the others of this group, except him, about his acceptability to your project?

A. Well, it developed as a matter of course, that he was accepted.

Q. And then from the time that you decided to go ahead with him, other negotiations, I suppose——(interrupted)

A. We dropped—we dropped the other negotiations, yes, and [31] went ahead with him.

Q. All right. Now, how did he happen to—do you know how he happened to get in touch with anybody at American Business Credit Corporation?

A. I introduced him and Mr. Royce to George W. Davidson, who was then the Vice President and Manager of ABC here in Portland. I had been instrumental in getting some financing done by ABC for some other clients, and so I introduced Mr. Bentson and Mr. Royce to George Davidson, and the negotiations about the loan were carried on from there by them.

Q. Now, is Mr. Davidson still living?

A. No, he's deceased.

Q. And what about Mr. Bentson?

A. He's deceased also.

Q. Do you know what was—were you present at any of the negotiations between Mr. Bentson and Mr. Davidson?

(Testimony of Robert T. Jacob.)

A. No, after I introduced them, they went on from there.

Q. Now, there are, I think going to be admitted on stipulation in this case, some receipts given by Mr. Bentson to you, Mr. E. Royce, B. Royce, Mr. Niederkrome and Mr. Schneider, for stock. What was the purpose of those?

A. That was the loan to Mr. Bentson of our security as we understood it, ABC required Mr. Bentson to borrow our stock to be pledged along with his as security for this loan.

Q. Why were you people willing to give your stock for security [32] for someone else's loan?

A. Well, simply because we wanted to pledge our stock, and we understood that Mr. Bentson, his funds were all in Canada, and were blocked by reason of war regulations in existence at that time, and I understood also that because he was a Canadian citizen, that the ABC required additional security, and we saw—we had no objection to loaning our collateral to him.

Q. From the standpoint of a potential investor in 1945—in June of 1945, what was the appearance of Oregon Motor Stages?

A. It was excellent. They had had a very fine earning record, and they were in good financial condition, and although their equipment was becoming somewhat worn, and some of it decidedly antiquated, they still were doing an excellent business, and their earnings had been in excess of a million dollars. In one years—in one year, I

(Testimony of Robert T. Jacob.)

believe in excess of two million dollars, and they had been paying substantial dividends, and the prospects were still very good at that time because the war was still on.

Q. Well, what was your own attitude at the time with respect to the probable ending of the war—the effect upon that business?

A. Well, we—we had no idea, of course, about that. None of us knew about the existence of the atomic bomb, and we expected the operation to continue at the then pace for an indefinite period. We had no—it was true that the—Germany had capitulated, but according to our information, there was still considerable danger so far as Japan was concerned, and we had no idea—Russia was being [33] asked to come into the war. We had no idea how long it would continue, or whether it might be a year, two years or what.

Q. Well, was there any thought by you or the people that you were with there, of a quick closing?

A. No, not at all. We had no idea that there would be.

Q. All right. Now, then, what type of business patronage did Oregon Motor Stages have, in connection with—(interrupted)

A. A good part of it was from the camp at Camp Adair, Oregon, which was located just out of Corvallis, and a lot of it was the Tongue Point Naval Station, and the Auxiliary Stations in Astoria, and our longest run was from Portland to

(Testimony of Robert T. Jacob.)

Astoria, and that, of course, was one of the most prolific sources of income that the company had at that time; and another thing too, the gas rationing made the use of private automobiles rather restrictive, and we were enjoying a very substantial patronage from the civilian trade. A lot of it was even local trade, from the outlying suburban towns into Portland during the war activity.

Q. Mr. Jacob, what area did the company's franchises cover?

A. Covered the operations from Portland through to Oregon City and down to Tillamook, through McMinnville, out through Corvallis to Salem, and down to Newport, and from Newport to Astoria, and from Astoria to Portland by way of the River Road and also Sunset Highway. Then we had local service to Forest Grove, and to McMinnville, to Newberg, and Reedsport—a number of the local suburban towns in this locality. Besides, we had the City operation in [34] Salem and Eugene, and there was a run too, from Eugene over to the coast.

Q. That was all franchised territory?

A. All under franchise—permanent operation.

Q. Permanent operation? A. Yes.

Q. Now, after you had decided—your group there had decided to take in Mr. Bentson, what took place?

A. Then we arranged to acquire cashier's checks for the respective amounts that were to be paid. After acquiring the checks, we met in the board

(Testimony of Robert T. Jacob.)

room of the First National Bank, Main Branch, at which all of our group, I believe, except B. Royce might not have been there. Were there, Mr. L. D. Jones of the selling group, and Mr. Lemon and Mr. Frank McColloch, an attorney who was representing the group were there, and Mr. Benton, of course, was included—I meant to include him in our group. He was there.

Q. And what took place there?

A. We met around the table and the stock of one of the stockholders was—the share with the certificate was issued to Mr. E. Royce, and he qualified as a Director. Then one of the retiring Directors submitted his resignation, after Mr. Royce was elected, then the meeting continued. Another Director was elected after the resignation of one of the outgoing directors and so on until the old Board retired and the new Board was elected. When that was accomplished, the cashier's checks were delivered to Mr. McColloch, [35] I believe, as representative for the group, and the stock was issued in the names of the respective purchasers according to the number of shares that each had purchased.

Q. You all got stock certificates?

A. All got stock certificates is correct.

The Court: Is that Mr. McColloch, C. E. McColloch, or Frank McColloch?

Mr. Picco: No, it's Frank, your Honor.

Mr. Jones: And that is M-c-C-o-l-l-o-c-h. He is

(Testimony of Robert T. Jacob.)

a brother of Judge Claude McCulloch, of the Federal bench. [36]

* * * * *

Q. (By Mr. Jones): Mr. Jacob, I am handing you the Petitioner's Exhibit Number 32 for identification, and I am asking you if this is your signature on it, and if so, to explain what it is?

A. That is my signature, and Petitioner's Exhibit 32 for identification is Oregon Motor Stages Certificate of Common Stock, Number Seventy-seven, for three hundred and fifty shares, and issued in the name of L. R. Bentson; dated July 2nd, 1945.

Q. Now, I notice that it is endorsed in blank on the back of it. Will you tell us about where and when those endorsements were put on, if you know?

A. These endorsements—the endorsements were made at the meeting I have just described. Mr. Bentson signed, and his signature was witnessed by Mr. Frank McCulloch.

Q. And then was that given to ABC?

A. It was delivered to a representative of ABC at that time.

Q. At any time we use "ABC" the record can show that that is "American Business Credit Corporation," the Oregon company. If [37] we want to speak of the Delaware Company, we will say "the Delaware Company."

Mr. Jones: Now, I would like to offer this certificate in evidence. (Exhibit handed.)

Mr. Picco: No objection, your Honor.

(Testimony of Robert T. Jacob.)

The Court: It will be received. Exhibit 32.

(Petitioner's Exhibit 32, witness Jacob, received in evidence.)

Q. (By Mr. Jones): Now, Mr. Jacob, were certificates similar to that made at the same time, under the same circumstances to you for a hundred shares, to Mr. E. Royce for the hundred and forty-five shares, to Mr. B. Royce for fifty shares, to Mr. Niederkrome for fifty-five shares, and to Mr. Schneider for fifty shares? A. They were.

Q. Were they all endorsed in the same manner?

A. Exactly.

Q. And at the same time, were they also delivered to ABC?

A. They were. They were all endorsed and our signatures were witnessed by Mr. McColloch in those instances.

Q. That was after you had loaned them to Mr. Bentson, and taken his receipts?

A. They were—that was one of the steps in making of the loan, yes.

Q. All right.

Mr. Jones: I will, just for—these are already going in [38] evidence—they have already—we have a proposed—proposed paragraph in our stipulation that certain exhibits, unless they are objected to and the objection sustained, will be deemed to have been received in evidence, your Honor, and what I am handing Mr. Jacob now, are the Petitioner's Exhibits 2, 3, 4, 5 and 6—are all in that category. They may be marked later,

(Testimony of Robert T. Jacob.)

because I had pencilled numbers on them that the Clerk can pick them up from. I just would like to show them to the witness, and then to ask a question about them. No objection to that?

Mr. Picco: No objection to those exhibits, your Honor. They will be attached properly and identified in the stipulation.

The Court: They may be received at this time then.

Q. (By Mr. Jones): All right. Now, are those Exhibits of the Petitioner, 2 through 6, the receipts that you have been mentioning which were given by Mr. Bentson for the borrowing of your respective shares? A. That's correct.

Q. Do you know whether—do you know where Mr. Bentson signed a promissory note—the promissory note that he signed in this case, were you present when he signed it—you were there when he signed? A. No, I wasn't; I was not.

Q. You didn't see it signed?

A. No, I didn't.

Q. Now, Mr. Jacob, when you were—you mentioned purchasing [39] a cashier's check. Was that purchased before you went into this room?

A. That's right.

Q. And were you and Mr. Royce and Mr. Niederkrome—Mr. E. Royce, B. Royce, and Mr. Niederkrome and Mr. Schneider together when this was purchased?

A. We were all there, I think, except Mr. B.

(Testimony of Robert T. Jacob.)

Royce. I don't recall with respect to him, but all the rest of us were.

Q. Is this a copy—this Exhibit 8, a copy of the order for the checks that you wanted issued as cashier's checks?

A. It is, and the numbers of the respective cashier's checks are inserted—were inserted by the issuing teller.

Q. And those totalled four hundred thousand dollars' worth of cashier's checks?

A. That's right.

Q. I am speaking for the—(interrupted)

Mr. Picco: What Exhibit is that?

Q. I am speaking now for the record of Exhibit Number 8. Now, each of you people individually—(interrupted)

The Clerk: They are going to be attached to the stipulation, so I don't mark them.

Q. All right. Did each of the individuals that are—that you have last mentioned, pay over their own money at that time?

A. Well, I—it is my recollection they did. I don't—(interrupted) [40]

Q. Well, you paid your money though?

A. I paid mine, and I know the monies were paid in at that time, but I don't remember who paid in what. I just know that we were all there together, bought our cashier's checks, and went on up to the meeting.

Q. What I am trying to say, you put enough

(Testimony of Robert T. Jacob.)

money together—you each contributed up—enough—there was four hundred thousand dollars there?

A. That's right.

Q. It was shoved across the counter, and you got these cashier's checks back?

A. That is what happened. Who had the money, all of it, nor how much, I don't recall that.

Q. Now, were you present when Mr. Bentson purchased two cashier's checks?

A. I don't recall whether I was at the window at the time or not, but I know he was—I recall his being in the lobby, and purchasing checks. I don't recall whether I was at the window at the time or not, but I remember that he was there, in the lobby at the time, with the check of ABC for the purchase of the—(interrupted)

Q. Was Mr. Davidson with him?

A. No, he was not. There was a representative of ABC there, but I don't recall who it was; but it was not Davidson, I remember.

Q. Was Mr. Davidson at the meeting?

A. No, he wasn't. [41]

Q. But some ABC representative was at the meeting?

A. Yes, that's right; that's right.

Q. Did you ever hear anything—were you present when the note was signed?

A. No, I wasn't.

Q. Did you ever hear Mr. Bentson say why he wanted to purchase into this business?

A. Yes, I did.

(Testimony of Robert T. Jacob.)

Q. What did he say?

A. He said that he had watched his nephews in their operations and they had been quite successful, and that he wanted—he had spoken to them on different occasions previously, requesting that at some time, he be permitted to acquire an interest in some of the projects they were going into, and his reasons for it was that he said he had a niece in Portland, was the only relative that he had, and he wanted to create an estate for her here in Oregon, and that is what his reason, he said, for being interested.

Q. Mr. Jacob, you had mentioned that this Oregon Motor Stages had a history of good earnings—do you know whether Mr. Bentson had been informed of that?

A. He had—he was, very definitely, and I know that he camped on Mr. Schneider's trail here for several days, in connection with the operation before he went into it, and Mr. Schneider would know exactly what was done in that respect, but I knew that he was with Mr. Schneider for quite some time before he decided finally to go [42] into it.

Q. Well, now, when did you first learn that Mr. Bentson wanted to get out of the sales of the stock?

A. Well, it was some time in the latter part of August.

Q. And how did you find that out?

A. Well, he came to Portland again, and as I recall, he came in with Barney Royce, who lived in

(Testimony of Robert T. Jacob.)

Vancouver, Washington, and said that he wanted to get out; that he had—that the end of the war had changed the prospect of matters, and he preferred to retire from the operation, dispose of his stock.

Q. Do you know whether or not he addressed some sort of a communication to the corporation or the President concerning that desire?

A. He did; he did, yes.

Mr. Jones: Mr. Picco, have you photographed that—(interrupted)

Mr. Picco: We have the original here. Of course, that is also in the stipulation. [43]

* * * * *

Q. (By Mr. Jones): I am showing you Exhibit 9—is that the communication that you referred to? A. That's right.

Q. Now, after that communication was received, what action, if any, was taken, by the— (interrupted)

A. Well, a meeting of the Board of Directors was had, and this communication was considered and acted upon, and it was voted to acquire Mr. Bentson's stock, and after—after that action, a check for three hundred and fifty thousand dollars was issued to Mr. Bentson.

Q. Did you ever see the check—that is, prior to the time it was delivered to ABC?

A. I don't recall seeing it even before or after, except photostatic copies. I had nothing to do with the writing of the check or I don't recall seeing it.

Q. I want to show you what is the stipulation

(Testimony of Robert T. Jacob.)

Exhibit number 10, and ask you if that is a photostatic copy of the check you are speaking of?

A. It is.

Q. Now, my question is, did you—did you ever see the check or have you only seen the photostatic copy of it?

A. I recall at the time that the photostat was obtained that Mr. Royce—this was after though. This was some years after the—its issuance. Mr. Royce and I went to the bank to see about getting a photostatic copy, and we found that the check was kept over on the [44] East Side, at one of the branches of the bank, and I don't believe I went over there and looked at it. If I did, I don't recall it, but I had nothing to do with the signing of it.

Q. Well, is it true then, that you have never seen—you never saw the actual check?

A. I don't recall that I ever saw it, unless I saw it in the hands of the bank which retained it after it was certified.

Q. I see, but you never saw it before it was negotiated and went back to the bank?

A. No.

Q. That is the point I wanted to keep in mind. Now, did you have any interest whatever in this three hundred and fifty shares of stock purchased by Mr. Bentson?

A. None whatsoever.

Q. Did you put up any money for any part of it?

A. Not a dollar; no, sir.

Q. Did you get any benefit out of either its purchase or sale?

(Testimony of Robert T. Jacob.)

A. If I did, I don't know what it was. I certainly can say that I got none whatsoever, actual benefit out of it. The question as to whether the stock I retained was worth more or less is one that is open to argument. I think that our stock was worth less after—even after the amount was paid over to Bentson. Certainly, the book value of the stock went down considerably, and I think, too, the earning capacity of the corporation was depleted.

Q. Did you ever have any expectation of getting any benefit out [45] of any of the shares purchased by Bentson? A. None whatsoever.

Q. In any way? A. None whatsoever.

Q. Did you have—ever have any agreement with anybody that you would get any benefit, direct or indirect out of that purchase?

A. I certainly did not.

Q. Now, when this stock was turned in by Mr. Bentson, was it cancelled? A. Yes.

Q. And the capital of the—the capital structure of the corporation, its authorized shares of—of— (interrupted)

A. Seven hundred and fifty.

Q. —seven hundred and fifty shares of par value of a hundred was reduced to— (interrupted) A. Four hundred shares.

Q. Of a par value of a hundred?

A. Right.

Q. And those shares have never at any time been reissued? A. They had not.

Q. Was the capital changed up again?

(Testimony of Robert T. Jacob.)

A. It has been reduced successively since.

Q. Now, there were some other sums paid, I believe, by ABC to—paid to ABC by Oregon Motor Stages at the time that this redemption was made—they are mentioned in our stipulation—— (interrupted) [46]

A. Mr. Jones, there was one payment made prior—on the statement from Mr. Davidson, to Oregon Motor Stages, I believe, representing a charge for services, according to the reading of the statement, and that was charged on the books of Oregon Motor Stages as “professional services,” whereas, it was my understanding, and I thought all the time that it had been charged to Mr. Bentson—should have been charged to L. R. Bentson, but I had nothing to do with the accounting, nor the charge, but it is my understanding that it would be and that it had been charged to Bentson.

Q. When did you find out the first time that it wasn't charged to—— (interrupted)

A. When the Revenue Agent started making his investigation of the transaction.

Q. And what did the Revenue Agent's report show with respect to that?

A. Well, it showed it was charged on the books of Oregon Motor Stages to an expense account, instead of being charged as an account receivable to Mr. Bentson.

Q. And then what did the Revenue Agent propose doing then?

(Testimony of Robert T. Jacob.)

A. Well, he disallowed it as a deduction on the part of Oregon Motor Stages.

Q. Oregon Motor Stages conceded—(interrupted)

A. They conceded that it was erroneously deducted, and the same was true of the amount of interest which Mr. Bentson made as a stipulation—as a condition to surrendering his stock, that the [47] company pay ABC the amount of interest charged, and that was also charged to “interest expense,” erroneously so at the time,—was disallowed by the Revenue agent and admitted by the—by us that it was improperly charged.

Q. Did you know anything about that charge either at the time? A. No, I didn’t.

Q. Well, wouldn’t that—wouldn’t that have been—I don’t express any opinion one way or the other, but would that have been a proper charge under the terms of his—(interrupted)

A. To expense?

Q. Yes.

A. Well, I don’t know. I hadn’t considered it fully, and—but I assume not. I don’t know—it—it may have been, either that, or part of the cost of the stock. More likely, it would represent a cost of the stock, rather than an expense item.

Q. As far as you know, or have any knowledge of, did any of the parties I am going to name—E. Royce, B. Royce, Schneider or Niederkrome, receive any benefit in any way from the purchase by

(Testimony of Robert T. Jacob.)

Mr. Bentson of his three hundred and fifty shares?

A. Absolutely not. As far as Mr. Niederkrome is concerned, he was required by the Interstate Commerce Commission, because of his Directorship in another—another carrier, to dispose of his stock. He did so in 1946, at the identical price that he had paid for it, so it left him right in the position he was before he went into the project, and while that would be the extreme case, we got no more [48] benefit from the surrender of the three hundred and fifty shares than he did from the surrendering of his shares to another purchaser.

Q. Well, but—my question really was whether you know—(interrupted)

A. Whether they got—(interrupted)

Q. —if any of them—whether you know whether any of them got or was intended to get any benefit out of it?

A. I didn't get the word "intended," no, they didn't—they didn't intend to have any part in the purchase, or in any way, with the three hundred and fifty shares.

Q. And do you know whether or not there was any agreement that they would participate in any way, or for any benefit whatever in those three fifty shares?

A. There was absolutely no agreement that I had any knowledge of.

Q. Now, how did the earnings of Oregon Motor Stages go after the war was over?

(Testimony of Robert T. Jacob.)

A. Well, they started to decrease, and steadily decreased, from something over two million down to less than a million dollars, in gross revenue.

Q. Except, I think, there was one year, when there was a little spurt there?

A. Probably—probably there may have been one year.

Q. Now, was the redemption intended to be of any stock except these stock? I mean, Bentson's stock? [49]

A. You mean at the time of the —(interrupted)

Q. That it was made. That wasn't a redemption for any—was that a redemption for anybody else's stock—was that supposed to be a pro-rata redemption of stock?

A. Not at all. There was no—there was no—there was to be no redemption except his shares.

Q. Now, would there have been any loaning of this stock except for ABC's demands? A. No.

Q. Did either Mr. Bentson or Mr. Niederkrome have any connection with Oregon Motor Stages after each of them went out? A. No, they did not.

Mr. Jones: You may cross-examine.

Cross Examination

Q. (By Mr. Picco): Mr. Jacob, what was your position in Oregon Motor Stages in 1945?

A. Secretary.

Q. How many shares of stock did you acquire?

A. One hundred.

Q. Now, did you say on direct that as far as

(Testimony of Robert T. Jacob.)

the negotiations for the purchase of stock, that you were active in those negotiations?

A. Yes, I was.

Q. Was Ezra Royce active too?

A. Yes. [50]

Q. Was anybody else active in the negotiations?

A. You mean directly with the—with the sellers, or in what way do you mean?

Q. That is correct.

A. Directly with the sellers? I believe Mr. Schneider first contacted Mr. Jones, and then, from then on, my recollection is that the negotiations were continued by Mr. Royce and myself. I don't remember Mr. Schneider having anything to do with it—with the negotiations after that time, until we met for the purchase of the stock.

Q. Now, in the negotiations for the loan, were you active in that?

A. I introduced Messrs. Bentson and Royce to Davidson. From then on, I was not active.

Q. That is the only part you took in the negotiation for the loan?

A. Introduction, that's right.

Q. Now, in your recollection—or do you know how long these negotiations for the purchase of the stock—how long it took for the negotiations? When did you start negotiations?

A. My recollection is it would be some time in May—May, 1945, and then they continued on—be something over a month.

(Testimony of Robert T. Jacob.)

Q. I take it you had quite a few meetings and conferences in connection with that—during that period of time?

A. Quite a few; quite a few, that's right.

Q. And the negotiations lasted all the way down to [51] July 2, 1945, when the transaction took place?

A. That's right.

Q. Now, during that time, you were trying to interest some additional purchasers in the purchase of this stock?

A. Additional stock, that's right.

Q. Who did you try to interest in the purchase of the stock?

A. Those with whom there was serious consideration were A. H. Wenck of Seattle, and Lance Rothchild of San Francisco.

Q. Those are the individuals that have been associated with Mr. Royce—(interrupted)

A. Right.

Q. —in Yellow Cab Company and other ventures?

A. That's right.

Q. Now, they were anxious to buy that stock, were they not, or do you know?

A. I don't know that, Mr. Picco. I remember we discussed it with them, and at one time, I thought Mr. Wenck was going to take some of it.

Q. You, yourself, were intending to buy additional shares of stock, were you not?

A. I considered buying additional stock, yes. As a part of the second group that was being formed.

Q. Now, you—you discussed Mr. Bentson's par-

(Testimony of Robert T. Jacob.)

ticipation in the negotiations for the purchase of stock. Will you tell us how active he was in that?

A. Well, he—after—after he got the information he wanted, and after he made his purchase, he was inactive from then on. He was not active at all in the company's affairs, and neither were any of the rest of us, except Mr. Schneider, actually.

Q. When did he first become interested in the negotiations for the purchase of the stock?

A. Some time the latter part of June. I don't recall the exact date—I remember it was a Sunday. It was a Sunday evening that I went out to Mr. Royce's and met him, and it was some time in the latter part of June.

Q. Now, was he active during all of that time right down to the day of the transfer of the stock from the old stockholders to the new stockholders?

A. That's right. He remained here in Portland, as I recall it, until the transaction was closed. There may have been a lag where he went back to Vancouver, but he was active around here for quite some time, I recall. After I—after I introduced him to Mr. Davidson, I didn't see him again that I recall, until we purchased the cashier's checks and had our meeting.

Q. When do you think you introduced him to Mr. Bentson—or to Mr. Davidson of ABC?

A. Well, it would be—it would be some time in June, I don't know exactly—it would be some time the latter part of June, I will say—between the 15th and the end of the month, I would say.

(Testimony of Robert T. Jacob.)

Q. Now, did you say you knew him very well?

A. No, I hadn't met him until I met him at Mr. Royce's.

Q. Was his wife with him at the time?

A. No, she wasn't.

Q. Do you know where he stayed?

A. I believe he stayed with E. Royce. He was out at his house when I met him, and I am not sure, John, whether he stayed there all the time or not, or whether he was with Barney part of the time, or what. I know, I met him at Mr. Royce's.

Q. Did you describe Mr. Bentson. I think you were trying to describe him in your direct examination?

A. Yes, sir, he was a very good looking Scandinavian—very impressive looking, and at the time he was here, he was quite well-dressed in—I remember at the meeting particularly, he made the most impressive presentation of anybody there. He was—he sat up and took part in all the negotiations, and seemed to be enjoying it thoroughly. He was dressed in a dark suit—had on a white shirt and tie, and to me, he made a very good impression.

Q. How—was he an elderly man?

A. Yes, he was. He was along in years. I don't know how old he was. But he was certainly alert and active at the time he was there. There was no indication of anything but a very alert man.

Q. Now, this stock was desirable in a sense that profits were excellent, and it looked as if large divi-

(Testimony of Robert T. Jacob.)

dends could be obtained through the corporation, is that right?

A. They had been paying substantial dividends and certainly, the [54] earnings had that implication. We thought it would be a very profitable venture.

Q. Had Mr. Bentson stated to you, or you found out that his funds, if any, were blocked in Canada?

A. He stated at the time, that they were. That for that reason, he would have to make arrangements for financing here, if he were able to go into the project.

Q. Did he anticipate that the war restrictions would be lifted inside of three months?

A. That, I wouldn't know, John, what he anticipated.

Mr. Jones: I didn't hear that. Would you mind repeating that?

The Court: The question was, did he anticipate?

Q. Did he anticipate that the war restrictions would be removed in three months—the period of the loan? You say you don't know that?

A. No, I don't know. He didn't—nothing was said about—he just simply said his funds were blocked, and so far as the loan being for three months, my understanding was that it was renewable—all of the notes that I was familiar with that had been issued prior to that time by ABC, had been issued for ninety days, and they were renewable continuously for quite some years.

Q. Now, you are talking about the practice of ABC, or—(interrupted)

(Testimony of Robert T. Jacob.)

A. Yes, as far as—(interrupted) [55]

Q. ———from your knowledge?

A. Yes, from my knowledge, yes.

Q. Now, you are not talking about this particular note, are you?

A. No, I am talking about the practice. I had—I did none of the negotiating, so I wasn't informed as to that.

Q. Did you not consider that it was rather risky to pledge your stock on the basis of his credit, under the circumstances?

A. No, I thought he was a substantial individual, and I saw no particular hazard in our surrendering our shares as collateral.

Q. Well—(interrupted)

A. As a loan to him, if you will notice, the receipt that he gave us specifically states that it is being loaned—the stock was being loaned to him for the purpose of the pledge.

Q. You didn't receive any evidence. did you, Mr. Jacob, about any financial statement showing his net worth?

A. No, I didn't get any such statement.

Q. Now, isn't it true that you pledge your stock because you knew that Mr. Ezra Royce was—was liable on that note, and that everything would be all right?

A. I don't recall that I gave any consideration to that. I don't recall giving that any thought. As a matter of fact, I don't know when ABC said that they would want this pledge, I don't recall that they

(Testimony of Robert T. Jacob.)

said that they were going to require an endorsement.

Q. You knew little about the negotiations of the loan, you have mentioned that? [56]

A. That's right.

Q. Did you know or understand that the stock would be retired shortly, and the loan paid up out of the earned surplus of the Oregon Motor Stages?

A. No, it wasn't our intention at all.

Q. Now, it is stipulated—I think it is in paragraph 34 of the stipulation—paragraph 25 of the stipulation, concerning the interest payment and the finance charges, and the invoice that you were talking about, is Exhibit C—this is it right here, isn't it?

A. That's right.

Q. Now, that was paid—can you tell by that. The invoice was dated July 17, 1945?

A. That's right.

Q. And it was stipulated that it was paid on July 19, 1945?

A. That's right.

Q. Now, you say you didn't know anything about this?

A. I—I said I thought that that was charged to—my understanding was it was to be charged to the—to Bentson. I didn't say I didn't know anything about it.

Q. Are we talking about the time of this instrument—Exhibit 9, July 17, 1945—do you know about this at that time, or are you talking about your knowledge of it now?

A. No, I knew that Royce was billed, yes. I

(Testimony of Robert T. Jacob.)

mean, I knew that the company was billed by Davidson, yes.

Q. But you don't know how it was handled? [57]

A. No, I didn't know until—(interrupted)

Q. Until later?

A. Yes. Mr. Nicholson (phonetic)—(interrupted)

* * * * *

Q. Now, you stated that George W. Davidson is now deceased. He was the Vice President, was he not, and General Manager of American Business Credit Corporation?

A. Yes, that is my understanding.

Q. You stated that George Davidson was or was not at the First National Bank at the time the transaction was closed? A. He wasn't.

Q. And you don't know anything about the negotiations of the loan, involving George Davidson's participation in it?

A. Not from the time I introduced him to Mr. —(unfinished answer)

Q. Now, isn't it true that after the stock redemption, there were less shares of stock, and consequently, an opportunity for larger dividends for the stockholders? [58]

A. No, because there was a—there was a pro-rata reduction of assets by the three hundred and fifty shares in excess of the assets remaining as outstanding against the four hundred shares. Now, as to the operating potential, I think Mr. Schneider would be—who was the Manager, would be in better

(Testimony of Robert T. Jacob.)

position to explain that arrangement, but so far as the net worth of the company was concerned, pro-rata per share, it was considerably reduced.

Q. You had a smaller group of stockholders, did you not?

A. Smaller group of stockholders, but the assets against our stock were less than they were when they were at seven hundred and fifty shares.

Q. The profits potentialities of this corporation remained constant, despite this transaction, did they not?

A. No, they started to decline, and—(interrupted)

Q. Not because of the transaction involved?

A. Well, that, it could well be, because with the additional capital, it would have been possible to have acquired additional equipment, and with additional equipment, there could have been a different operating schedule, and I would say that proportionately, there would be an operating potential which was reduced by the reduction of capital.

Q. Now, you are there assuming—assuming some statements there about the equipment, are you not?

A. About the acquisition of it? Well, I know that—no, I know that the equipment, a lot of it was antiquated, and was retired [59] and disposed of. I know that there were times when we could have used better equipment to advantage, but—I would say that would reduce the earning potential of the company.

Q. Actually, it—it took—it was a long time be-

(Testimony of Robert T. Jacob.)

fore the business dropped off on account of loss of war trade, is that right?

A. No, it dropped off the next year. The earnings for 1946 were considerably below 1945.

Q. The revenues were still in excess of a million dollars a year or so after that, were they not?

A. Yes, the one year, I think, they exceeded a million—one or so—yes, I guess two or three years, but prior to this time, the revenues were well over two million.

Q. Now, if you are—why didn't—why didn't you people, that is the Petitioners, if you please, Mr. Jacob, buy this stock of Bentson's?

A. Why did we buy it? We didn't buy it.

Q. Why didn't you buy it, rather than have the corporation—(interrupted)

A. Oh, why didn't we?

Q. That is correct.

A. Well, we didn't—we weren't interested originally in acquiring any more stock.

Q. Well, didn't you testify that you were intending to buy additional shares of stock?

A. I did, but that was only an expedient—or, if I had to in [60] order to perfect the transaction with respect to the other. If I had acquired additional shares, it would have been on the basis of retaining them.

Q. Did you people seek to get the—Mr. Wenck from Seattle and Mr. Rothchild from San Francisco to buy his stock at that time?

(Testimony of Robert T. Jacob.)

A. Buy his—Bentson's?

Q. Bentson's stock?

A. No, no; no, we did not.

Q. Now, if you had any fears of needing capital for new equipment, wouldn't that have been the way of doing it?

A. You mean to have somebody else buy the stock on the outside?

Q. The individuals you knew were anxious to buy, that you have stated were anxious to buy—Mr. Wenck and Mr. Rothchild.

A. I didn't say they were anxious. I said at one time, Mr. Wenck had expressed an intention of going ahead in the original purchase, but he backed out after Bentson came on the scene, and then, too, in the meantime, the war had ended, and the picture was utterly and entirely changed from that time on, as to the prospects for the company. It was obvious that there would be—(interrupted)

The Court: Mr. Picco, we will take a recess at this time. [61]

* * * * *

Cross Examination—(Continued)

Q. (By Mr. Picco): In any event, no effort was made at the time you were considering the offers of Mr. Bentson to have the Oregon Motor Stages take over the stock—no mention was made at that time of trying to get other purchasers for that stock, as you had originally done?

A. No effort was made, that's right.

(Testimony of Robert T. Jacob.)

Q. That wasn't considered?

A. I don't recall whether it was considered. I know no effort was made.

Q. Do you know whether Mr. Niederkrome or Mr. Schneider actually put up any money of their own?

A. I don't know that.

Q. For the purchase of the stock?

A. I don't know that, no.

Mr. Picco: That's all, your Honor. [62]

* * * * *

F. C. NIEDERKROME

a witness called on behalf of the Petitioners, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record?

The Witness: F. C. Niederkrome—that is spelled, N-i-e-d-e-r-k-r-o-m-e.

Mr. Jones: If the Court please, at this time, I will devote my questions to the issue that the last witness was testifying on.

Direct Examination

Q. (By Mr. Jones): Mr. Niederkrome, how long have you lived in Portland?

A. Since 1916.

Q. What is your occupation?

A. Accountant for the Yellow Cab Company and Gray Line Company.

Q. And are you the Petitioner in Docket Number 51491?

A. Yes.

The Court: Speak a little louder.

Q. Now, did—(interrupted)

(Testimony of F. C. Niederkrome.)

The Court: Speak just a little louder.

Q. Did you buy fifty-five shares of the stock of Oregon Motor Stages? [63] A. Yes.

Q. Were you ever an officer or Director of that company? A. Yes, I was.

Q. From what time?

A. From July '45 until about the middle of—the latter part of June '46.

Q. How did you happen to release your stock then?

A. Well, about thirty days or sixty days before I released it—(interrupted)

Q. I can't hear you, Mr. Niederkrome.

A. About thirty days or sixty days before I released my stock, I was contacted by an agent or examiner for the Interstate Commerce Commission, and he informed me that it would be necessary to change the ownership or dispose of my stock, or relieve myself of the Directorship of one of the other companies.

Q. What other companies?

A. I was a Director in the Gray Line Company.

Q. The Gray Line Company is a transportation company?

A. It's a transportation company, and it operates on a permit with the Interstate Commerce Commission.

Q. Now, did you—how long did these discussions with the ICC last?

A. Well, they lasted probably thirty days, because I had several discussions with him.

(Testimony of F. C. Niederkrome.)

Q. All right, now, what did you do with your stock? [64]

A. Well, I finally made arrangements to sell it to Mr. A. L. Schneider.

Q. Now, were you at this meeting on the—at the bank on July 2nd, 1945, when this transaction was put together? A. Yes, I was.

Q. Now, at the time that you all went into this transaction, what was your attitude with respect to the continuation of the war?

A. Well, at that time, there was—there was nothing on the horizon which would indicate that there was going to be an immediate cessation of hostilities.

Q. And what—when the war stopped in August—when the fighting stopped in August, was there any difference—change in the outlook then?

A. Well, there was. There was—there was—an apparent notice—you could notice that there was some change taking place.

Q. No, I mean, with—in your attitude with respect to the business holding up of your company, the Oregon Motor Stages?

A. Well, I hadn't—I had that time, I hadn't been worried too much about it. I thought it was okay.

Q. Now, I am talking about the war was over, was there any different attitude then?

A. In respect to the—(interrupted)

Q. Whether your patronage would continue on the same level as it had been during the war?

(Testimony of F. C. Niederkrome.)

A. Well, it was apparent it wouldn't continue.

Q. Now, when did you first learn about Mr. Bentson's desire to sell his stock?

A. Well, I first knew about it when he submitted a letter to the Board.

Q. Were you—(interrupted)

A. With an offer.

Q. Were you at the—were you at the Oregon Motor Stages Directors' meeting when that offer was considered?

A. I think I was, yes; yes, I was.

Q. Now, if the—why was the offer accepted?

A. Well, based on all the facts at the time, we considered it to the best interest of the company to accept it.

Q. And the Oregon Motor Stages then paid this three hundred and fifty thousand dollars to Mr.—(interrupted)

A. Yes, they accepted it and paid the three hundred and fifty thousand dollars.

Q. —Bentson. Now, did you receive any part of the three hundred and fifty thousand dollars?

A. No, sir, I did not.

Q. Did anybody receive any benefit from this payment to Mr. Bentson? A. No, sir.

Q. Were you under any agreement—were there any agreements with you and the rest of them, as far as you know, whereby anybody would get any benefit from it? [66]

A. No, there was none.

(Testimony of F. C. Niederkrome.)

Q. At the time you went into it, did you expect to get any benefit because of Mr. Bentson buying the stock? A. No.

Q. This redemption was only of his stock, wasn't it? A. Of his stock.

Q. Yes. A. Only of his stock.

Q. Yes. Was there any expectation or understanding that anybody would in any way be interested in his stock?

A. Among the stockholders?

Q. Yes. A. No, I didn't know of any.

Q. Except himself? A. That's right.

Q. Now, did you realize any gain or benefit of any kind because of his selling his stock to the company?

A. No, I got—I received nothing of any kind, in the way of gains.

Q. Was your interest limited solely and exclusively to the stock you purchased?

A. To the stock I purchased.

Q. Why did you pledge your stock to Mr. Bentson—or loan it to Mr. Bentson?

A. Well, we were all interested in completing the deal, and [67] the ABC Company requested it, so I pledged my stock in order to complete the deal.

Q. Was this done only as an accommodation to Bentson? A. That's right.

Q. Have you had any connection with Oregon Motor Stages since July 20th, '46?

A. None whatsoever.

Mr. Jones: You may cross-examine. I will put

(Testimony of F. C. Niederkrome.)

a limit to this witness to this issue at this time, if it is all right, your Honor. You may cross-examine.

Cross Examination

Q. (By Mr. Picco): Mr. Niederkrome, you are related to the Petitioner, E. Royce—Ezra Royce? A. Yes.

Q. What relationship?

A. He's my brother-in-law.

Q. You purchased fifty-five shares, did you not?

A. Yes.

Q. Of the Oregon Motor Stages?

A. That's right.

Q. You were anxious to buy that stock at the time?

A. Yes, at the time, the operation looked like a mighty good deal.

Q. You anticipated——(interrupted) [68]

A. And I thought this was an opportunity to invest some money and enhance my position in future years.

Q. Now, you were—were you active in negotiations for the purchase of the stock?

A. I was—I couldn't say that I was active, but I was interested, and talked to several people, and one of them was Mr. Wenck. In fact, I had a conversation with him about the purchase of the Oregon Motor stock at my house, and he was very much interested.

Q. He was anxious to buy the stock too?

A. That was during the period of negotiation.

(Testimony of F. C. Niederkrome.)

Q. Did you say yes to my question? Was he anxious to buy the stock?

A. He was interested. In fact, I was very much surprised as I learned later that he didn't buy it.

Q. He didn't—you didn't know the reason why he didn't buy it?

A. No, I didn't know what his reason was that he—why he changed his mind.

Q. At your home, he indicated that he was very anxious to buy the stock?

A. Yes, we talked about it considerable, and he seemed to think it was a wonderful deal, which I did.

Q. Did you know of anybody else that was very much interested in buying the stock?

A. No, he's the only man outside of the stockholders that go into [69] the deal that I had any conversation, that I can remember now.

Q. Who would you say was the active member of the group—of the Petitioners here, Ezra Royce, Mr. Schneider, yourself, in negotiating for the purchase of the stock?

A. I—it was my understanding that Mr. Schneider started the negotiations and Mr. Jacob and Mr. Royce became interested in it, and——(interrupted)

Q. Would you say that Mr. Royce did the foot work? A. Well, yes, he did, considerable.

Q. He promoted the transaction?

A. For the purchase of the corporation, or the——(interrupted)

(Testimony of F. C. Niederkrome.)

Q. Of the stock?

A. Well, he was interested, and I know that Mr. Schneider was interested. Just who did the most foot work, I don't know.

Q. As far as negotiations for the loan are concerned, do you know that—whether Mr. Royce, Ezra Royce, was the one that was the most active in that?

A. No, I don't know, no, who was the most active in that.

Q. Mr. Ezra Royce is a very—has a very dominant personality, has he not?

A. Well, he's careful about his business transactions, I think.

Q. Now, he has an interest in many ventures?

A. Yes.

Q. In all of those ventures, he has the controlling stock interest, or the controlling partnership interest, does he not? [70]

A. Well, he, himself? Not necessarily.

Q. He himself or his family—members of the family?

A. No; no — his family. Who do you mean by his family?

Q. Wife? A. No.

Q. In Yellow Cab of Portland, which is a partnership—what is his interest?

A. He has a fifty per cent interest with his wife. His brother has the other fifty per cent interest.

Q. Is he the active partner?

(Testimony of F. C. Niederkrome.)

A. In the Yellow Cab? Yes.

Q. Barney Royce is out of the State, and has been for several years, has he not?

A. Yes. [71]

* * * * *

Q. (By Mr. Picco): You—did you borrow the money—any of the money for the purchase of your stock? A. Yes.

Q. Who did you borrow it from?

Mr. Jones: I object to that as incompetent, irrelevant and immaterial. It has nothing to do with—how he got his money, or where he got it is absolutely immaterial. The fact that he borrowed it and says he borrowed it and paid for his stock is sufficient.

Mr. Picco: I believe it is very material, your Honor. One of the issues here is that Mr. Ezra Royce is the active party, and also, in the alternative, he, himself, might be the one that was interested in all this stock, and the fact that he has financed others is an indication on that and bears on it.

The Court: I believe he may answer. He may answer.

Mr. Jones: I have forgotten, your Honor, whether exceptions are saved——(interrupted)

The Court: Yes.

Mr. Jones: Thank you.

Q. (By Mr. Picco): Will you answer the question? A. Would you repeat the question?

Q. Did you borrow the money from Ezra Royce?

(Testimony of F. C. Niederkrome.)

A. Yes.

Q. Did you give him a note? A. I did.

Q. Did you pay that note back?

A. Well, I was obliged to dispose of my stock, and in doing so, the note was cancelled.

Q. Now, when was your stock sold?

A. I think it was June 20—June 20th, or thereabouts of 1946.

Q. In the following year? A. Yes.

Q. Had any payments been made on this note up to that time?

A. Oh, I don't know whether there had been any payments made or not—whatever the situation was. I came out of it without any loss of any gain.

* * * * * [73]

Continued Cross Examination

Q. (By Mr. Picco): As I understand it, Mr. Niederkrome, you didn't know Mr. Bentson at all, did you? A. Oh, yes, I knew him.

Q. How well did you know him?

A. Well, had—I had known him for several years. He came to Portland quite often, and occasionally, on those trips, he came in the office and talked to me.

Q. You didn't know anything about his financial condition?

A. Well, I understood that he had—had some interest, or had been in the gold-mining—mining business. I didn't know whether [74] it was gold mining or silver mining.

(Testimony of F. C. Niederkrome.)

Q. You didn't know what his activity was in the negotiations for the loan or for the purchase of the stock, did you?

A. No, I wasn't. I don't recall that. I wasn't—I *don't* I ever had anything to do with the negotiations.

Q. Now, at the closing, when the stock was transferred from the old—from the former stockholders to the new stockholders, a meeting was held at the First National Bank, wasn't it?

A. Yes.

Q. Were you there? A. Yes.

Q. Now, you don't—you don't know of your own knowledge if Mr. Bentson was there?

A. Well, I am of the impression that all the prospective purchasers were there, but I can't remember that, if they were all there or not.

Q. You weren't—you are not certain of that?

A. No.

Q. Now, do you know how long he stayed?

A. Well, it lasted several hours.

Q. Well, I mean, do you know how long Mr. Bentson was during his negotiations and everything—when did he go back, do you know?

A. Oh, I can't say, because he was in Portland off and on, and lots of times he would come into the office, and then other times he wouldn't. I haven't any idea. [75]

Q. Well, during this particular time, that is June, or July, or August of 1945, do you remember

(Testimony of F. C. Niederkrome.)

any times that he came into the office, or that you saw him?

A. I can't say definitely that he came in or that he didn't.

Q. He didn't——(interrupted)

A. During—during the negotiations.

Q. Well, did you see him at all during that period of time?

A. Yes, I probably did, because I saw him a good many times.

Q. That is, he was in and out all the time during this particular period of time, in June, July and August? A. Yes.

Q. Was he there after July 2nd, 1945?

A. I don't know. I think after July 2nd, he probably went back to Vancouver.

Q. Did you see him in August of 1945?

A. It is possible, but I can't tell you definitely that I saw him.

Q. Now, did you see him in August 31st, 1945, at the time that the stockholders considered having the corporation buy the three hundred fifty shares of stock that he had?

A. I don't—I didn't—I can't tell you. I don't think so.

Q. You didn't see him then? A. No.

Q. Do you remember at the meeting, whether Mr. Jacob was there, when you were considering whether you should redeem the three hundred and fifty shares of stock? [76]

A. Well, I think he was there. A long time

(Testimony of F. C. Niederkrome.)

to remember. We certainly would have the whole Board there.

Q. Now, isn't it true that you pledged your stock as collateral for the loan, three hundred and fifty thousand dollars from American Business Corporation because the Petitioner, Ezra Royce, told you to do that?

A. No, it isn't true. I did it because the ABC wanted this additional collateral, and I pledged mine in order to preserve and to help along the deal on the purchase of that stock.

Q. I thought you said that you didn't know anything about the negotiations for the loan?

A. Well, I didn't. But I pledged my stock.

Q. Now, Mr. Ezra Royce asked you to pledge the stock, did he not?

A. We all pledged our stock. It was done because it was the requirement of ABC, that they have this as extra collateral.

Q. Now, getting back to the meeting, when you were considering this letter of August 31, 1945, from Mr. Bentson—his offer to sell the stock to the corporation—did you consider at that time having Gus Wenck of Seattle, Mr. Rothchild of San Francisco, purchase that stock, rather than have the corporation take it?

A. Well, I didn't talk to anybody, because—I didn't talk to Gus Wenck. I didn't have much opportunity to see him. I never went to Seattle at that time a great deal. It was after my time that I had spent a lot of time in Seattle, and he

(Testimony of F. C. Niederkrome.)

had turned down the—the [77] proposition in the first place, so I never discussed it with him.

Q. The matter wasn't taken up at that time?

A. Not as far as I know.

Q. Now, you said you sold your stock in 1946, because of the Interstate Commerce Commission requirement? A. Yes.

Q. Now, didn't that same requirement affect the Petitioner, Ezra Royce?

A. No, it wouldn't—when I was—sold my stock, there was no longer any interlocking control in the two companies: that is, the Gray Line Company and the Oregon Motor Stages, which were both operating under ICC permits.

Q. Now, what was your position with Oregon Motor Stages? A. I was—(interrupted)

Q. Did you have—did you hold an office?

A. I was the Director and the Treasurer, for that short period.

Q. Were you also the Accountant?

A. No, not for the Oregon Motors.

Q. As Treasurer, do you—I will hand you here Exhibit C, which is stipulated as being that invoice for George W. Davidson, who was connected with the American Business Corporation. Now, as Treasurer, did you have something to do with the payment of that voucher?

A. No, I don't believe I did.

Q. Do you remember anything about it? [78]

A. No. I would—we had a comptroller there

(Testimony of F. C. Niederkrome.)

who handled the accounts and recording of such vouchers.

* * * * *

A. L. SCHNEIDER

a witness called on behalf of the Petitioners, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record?

The Witness: A. L. Schneider.

The Clerk: Will you spell your last name?

The Witness: S-c-h-n-e-i-d-e-r. Oak Grove, Oregon.

Direct Examination

Q. (By Mr. Jones): Mr. Schneider, you have a wife whose name is Bertha, is that correct?

A. That's correct.

Q. And you are the Petitioner in Docket 51532?

A. That is correct.

Q. And you and Mrs. Schneider are the Petitioners in Dockets—or in Docket 51533?

A. That is correct. [79]

Q. And she is the Petitioner in Docket 51534?

A. Yes, sir.

Q. Now, how long have you and Mrs. Schneider lived in or near Portland?

A. Since about the middle of 1945.

Q. Were you ever a shareholder or officer, or Director of Oregon Motor Stages? A. I was.

Q. From when to when were you interested in that company?

(Testimony of A. L. Schneider.)

A. I was interested in the Oregon Motor Stages from July of 1945 until September of 1952.

Q. Mr. Schneider, what was your position in the company?

A. I was General Manager, and——(interrupted)

Q. And did you have a corporate office?

A. Yes, I was Vice President of the company some—I believe, September of 1945 until it was sold. Until the company was sold.

Q. All right. Now, were you also a Director?

A. Yes, I was.

Q. Do you recall the negotiations that led up to the purchase of stock from Jones, Wilson and Lemon, who were the former stockholders?

A. Yes.

Q. Who was it that first learned that this stock might be purchased? [80]

A. I believe it was myself that learned that originally.

Q. And to whom did you convey the information?

A. I verified the information first and then conveyed it to Mr. E. Royce.

Q. And were you at the same time acquainted with Mr. Jacob?

A. Yes, I had been acquainted with Mr. Jacob for—oh, since probably around 1938.

Q. And did you know whether—who conveyed the information to Mr. Jacob?

A. I believe I did; I believe I did also.

(Testimony of A. L. Schneider.)

Q. And would you—did you take any part in the negotiations after your bringing it to the attention of these men—did you do any of the negotiating with Jones or Wilson or Lemon, with respect to the means and methods and payments, and so forth, of acquiring it? A. No, I did not.

Q. Who did that negotiation, did you know?

A. Mr. Royce and Mr. Jacob handled, I think, practically all the negotiations in that relation.

Q. Did you inspect the properties—assets, of Oregon Motor Stages before the purchase was made? A. I did.

Q. And it was purchased, I believe the stipulation says, on the basis of a thousand dollars a share? A. That's correct.

Q. All right. Now, how long did those negotiations stretch out [81] from the time that you first brought the matter to the attention of Mr. Royce until the meeting down at the bank?

A. Oh, I would say probably two to two and a half months.

Q. Now, did you know Mr. Bentson?

A. Yes, I didn't know him prior to—prior to this Oregon Motors deal, no.

Q. Where did you meet Mr. Bentson?

A. I met Mr. Bentson in the company of Mr. Jacob at Mr. Royce's home.

Q. Did Mr.—did you ever overhear any conversations among these men in which Mr.—at which Mr.—at which conversations Mr. Bentson took part about the acquiring of this stock?

(Testimony of A. L. Schneider.)

A. I was interested in the Oregon Motor Stages from July of 1945 until September of 1952.

Q. Mr. Schneider, what was your position in the company?

A. I was General Manager, and——(interrupted)

Q. And did you have a corporate office?

A. Yes, I was Vice President of the company some—I believe, September of 1945 until it was sold. Until the company was sold.

Q. All right. Now, were you also a Director?

A. Yes, I was.

Q. Do you recall the negotiations that led up to the purchase of stock from Jones, Wilson and Lemon, who were the former stockholders?

A. Yes.

Q. Who was it that first learned that this stock might be purchased? [80]

A. I believe it was myself that learned that originally.

Q. And to whom did you convey the information?

A. I verified the information first and then conveyed it to Mr. E. Royce.

Q. And were you at the same time acquainted with Mr. Jacob?

A. Yes, I had been acquainted with Mr. Jacob for—oh, since probably around 1938.

Q. And did you know whether—who conveyed the information to Mr. Jacob?

A. I believe I did; I believe I did also.

(Testimony of A. L. Schneider.)

Q. And would you—did you take any part in the negotiations after your bringing it to the attention of these men—did you do any of the negotiating with Jones or Wilson or Lemon, with respect to the means and methods and payments, and so forth, of acquiring it? A. No, I did not.

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Q. Where did you meet Mr. Bentson?

A. I met Mr. Bentson in the company of Mr. Jacob at Mr. Royce's home.

Q. Did Mr.—did you ever overhear any conversations among these men in which Mr.—at which Mr.—at which conversations Mr. Bentson took part about the acquiring of this stock?

(Testimony of A. L. Schneider.)

A. The only conversations that I heard relative to it was—or the first conversations, I will say, was perhaps a day or so prior to our meeting with Mr. Bentson at Mr. Royce's home. Those conversations were just to the effect that Mr. Bentson was interested in coming into the deal, and after that time, a day or two later, why, I met him, at Mr. Royce's home.

Q. Now, do you know whether Mr. Bentson ever made an inspection of the properties himself?

A. I don't know if he made any by himself. I know that he made an inspection with me over a period of two and a half days over all of the routes.

Q. Would you explain—give us the details of that, will you?

A. Well, after Mr. Bentson had become interested in obtaining [82] stock in this Oregon Motors deal, he asked me whether I would take him over the routes. I was making inspections of other various routes, as to scheduling and the depot and facilities, and I made two complete routes, or two—I made two days—in two days I made two routes, and then in one half a day, I made the following routes with him, covering down the River to Astoria, back to Seaside, and over the Sunset Highway, the following day into Forest Grove, to Tillamook, and back through Hebo, and McMinnville, and then back into Portland, and the following day, we covered the Camp Adair and Corvallis, and then drove back into Salem, and looked at the City transit lines—the transit line which was

(Testimony of A. L. Schneider.)

operating in the City, which was owned by the Oregon Motor Stages, and then came back, and took the route through Oswego and around the Lake there, and then back into Portland, which consumed—I think we got back around two o'clock in the afternoon on that.

Q. Now, did you inspect any of the bus stations and the tools and motor equipment and so forth?

A. Yes, Mr. Bentson and I also—we checked at every depot. He was very much interested in the facilities of the Oregon Motor Stages, over its routes, and he checked the—very much interested in the Camp Adair installation, and he went through the shop of the Oregon Motor Stages, at that time, we had a shop in Astoria, we had one in Forest Grove, and we had a shop in Corvallis, and we had a shop in Salem, and he also checked the facilities of the operation in Portland. [83]

Q. Do you know whether he looked over any of the records of the company? A. Yes, he did.

Q. And where did he look those over?

A. Up at the office of the Oregon Motor Stages.

Q. What records particularly did he check into?

A. Profit and loss statements, and the various statements as to operating revenue—operating ratios.

Q. And did he look—check into any of the means of handling the sale of tickets and receipt—money—of money in the various stages?

A. I believe I left him there for a couple of hours one day, and he said someone was going to

(Testimony of A. L. Schneider.)

pick him up, I believe Mr. Royce was going to pick him up later, and he stayed there for a couple of hours going over various things with the comptroller. In the stations, he merely made a cursory examination, as to how they handled things. He was interested from the standpoint of the physical end of it.

Q. Well, now, do you know whether or not, before he arrived on the scene, any attempt was made to interest other people to purchase any of the three hundred and fifty shares he eventually purchased?

A. I only know of two people that were more or less committed and were interested in it, and they are the two people—one in San Francisco, whom I had known before, and also the one in Seattle, who I had met.

Q. Can you remember their names? [84]

A. One was Gus Wenck, and the other one was Rothchild, who operates the Gray Line—not the Gray Line, but he operates the service into the—he operates the Yellow Cab in connection with the Gray Line service, I believe, in San Francisco.

Q. Now, were you at the bank meeting on July 2nd, 1946? A. Yes, I was.

Q. Prior to that meeting, did you—were you present in the main lobby of the bank where some cashier's checks were purchased? A. Yes.

Q. Did you put in any money there to buy some checks?

A. I couldn't get my check certified because it

(Testimony of A. L. Schneider.)

was on a—my money was not—hadn't been transferred into Portland, and Mr. Royce purchased the cashier's check for me, and then took—accepted my check.

Q. But you were there at the time it was done?

A. Yes, I was.

Q. And then, from the time the cashier's checks were purchased, did you go into this meeting?

A. Yes, I did.

Q. Remember who was there?

A. There was Mr. Jones and Mr. Lemon, and an attorney that they had, by the name of Frank McColloch, and Mr. E. Royce, Mr. Niederkrome, Mr. Bentson and Mr. Jacob and myself. I don't believe—I don't remember—I don't believe that B. Royce was there. I can't say for sure, but I don't remember him being there. He might have [85] been there.

Q. Was anybody there from ABC?

A. There was some man there. I didn't know him, from ABC, yes.

Q. Now, did—do you know whether or not any stock was pledged in connection with the loan made by ABC to Bentson? A. Yes.

Q. Who all pledged their stock?

A. Well, Mr. Niederkrome, and Mr. Jacob, Mr. Royce, and myself. I can't say whether Barney Royce's stock was pledged. I feel quite sure that it was, but that is hazy in my mind right now, whether he was there. I can't say for sure on that point.

(Testimony of A. L. Schneider.)

Q. Did you receive a receipt from anybody for the stock that you pledged?

A. Yes, I received a receipt from Mr. Bentson.

Q. I want to show you a receipt here. I am going to hand you the Exhibit that is numbered 6 in the stipulation, and ask you what that is?

A. That is a receipt from L. R. Bentson, for Certificate Number Seventy-six, Oregon Motor Stage stock.

Q. That was your certificate?

A. That is correct.

Q. And he gave you this at that meeting?

A. That is correct.

Q. And you endorsed your stock in blank over so that he could [86] pledge it then?

A. That is correct, yes.

Mr. Jones: I would like to read, if I may, this one receipt into the record.

The Court: Proceed.

Mr. Jones: (Reading) "Received of A. L. Schneider, Certificate Number seventy-six, dated July 2nd, 1945, for fifty shares of the common capital stock of Oregon Motor Stages, said stock being loaned to me to be pledged to American Business Credit Corporation, as collateral to this—to loan this day made to me for the purchase of three hundred and fifty shares of the capital stock of said company." Now, this receipt bears a signature of the man who made it, do you know whose signature that is? A. Yes.

Q. (By Mr. Jones): Whose?

(Testimony of A. L. Schneider.)

A. L. R. Bentson's.

Q. And he signed it and gave it to you?

A. That's correct.

Q. Did you have any interest of any kind in the three hundred and fifty shares of stock that he purchased?

A. No, I have no interest in the three hundred and fifty shares.

Q. Did you have any expectation or agreement, whereby you were going to benefit in any way through the shares he purchased? A. No.

Q. Did you ever benefit in any way by the shares he purchased? [87]

A. No, I did not.

Q. Did you ever receive—or were these—what was the outlook—I am going to start that over: What was the outlook of these purchasers, yourself in particular of course, in July, on the 2nd day, and the latter part of June, during this period of negotiations, with respect to the proposed purchase?

A. Well, basing from the past record of the Oregon Motor Stages, up to that period, and projecting it into the future, particularly based upon the theory that the war would continue for an indefinite period, and further based on the fact that it was going to be difficult to bring sufficient automobiles back into the market, and with the present growth of population which was in the west—coming to the west, it was considered an excellent opportunity for a good solid bus operation.

(Testimony of A. L. Schneider.)

Q. What portion of your business was derived from military patronage?

A. I think we could — we figured we could attribute perhaps in excess of fifty percent—attributed to the military action.

Q. From what components?

A. From the Astoria and coastal points, and from the Camp Adair points. Also, there was considerable military traffic which was being moved continuously on men on leaves and so forth, which was not a normal flow of traffic, but was traffic due to the war conditions.

Q. What was your outlook at that time—that was in the latter part of June, and up to the 2nd of July, with respect to when the war [88] would probably be over?

A. Well, of course, that was anybody's guess. We were all pessimistic as to the outcome of the war. I presume that the propaganda which was necessary under war conditions led us to believe that we had a war that was going to have long longevity, so we presumed that this would go on for quite some time.

Q. All right. Now, after hostilities ceased in August of 1945, what was your attitude toward the revenues of this company?

A. We felt that possibly, the gross revenues might decrease by—from twenty-five to fifty percent.

Q. What actually happened?

A. The gross revenues, with the exception of

(Testimony of A. L. Schneider.)

1947, did start to decrease. In 1947, they reactivated Camp Adair, and bringing the soldiers back, releasing them through that particular point, built our revenue back up to a higher point than they had previously, but from that point on, the revenues started to decrease, until, from two million four hundred thousand dollars, in that round figure, decreased to approximately nine hundred thousand dollars, which was greater than our anticipation—or our figures would be on.

* * * * *

Q. From what—did you receive any communication from Mr. [89] Bentson?

A. I didn't personally, no. The company did.

Q. Were you present at a Board meeting, when that was considered? A. Yes, I was.

Q. Had you ever talked to Mr. Bentson personally about the general subject matter of that communication?

A. Mr. Bentson—I talked to Mr. Bentson, I think, one or two days prior to the meetings we had.

Q. And what—do you know what his—did he reflect his attitude in that conversation about the future operations of the company?

Mr. Picco: I object to that testimony—statements from a decedent person, your Honor, on something that is not in issue.

The Court: Restate that question.

Mr. Jones: You sustained the objection?

The Court: Restate the question.

Mr. Picco: Restate the question.

(Testimony of A. L. Schneider.)

Q. Oh, what was stated by Mr. Bentson?

A. I mean, was there an objection?

Q. No. A. I'm sorry.

Q. I was asked to restate the question.

A. Mr. Bentson just stated that he felt the cessation of hostilities, the end of the war, was going to affect the business, and asked me what my opinion was, and I told him, frankly, that it certainly [90] would affect the overall picture, and he felt that he would much rather be out of the—as a holder of stock in the company, and said that he had written this letter to the corporation.

Q. And you were present then, you said, at the meeting, where the letter came up for consideration?

A. Yes, I was.

Q. And then we have stipulated the record into the stipulation, so I won't go on with that. Now, did you—the stock was purchased, was it not?

A. It was.

Q. And a check of the company was issued?

A. That's correct.

Q. To Mr. Bentson? A. That's correct.

Q. Now, his stock was then cancelled on the records of the company? A. Correct.

Q. Now, did you receive any gain yourself from that transaction? A. I did not.

Q. Did you expect to—was it intended that you should receive any gain yourself from it?

A. No.

Q. Was any of the other stockholders, except yourself, to get any gain from that transaction?

(Testimony of A. L. Schneider.)

A. I don't see how they could. Not to my knowledge—there [91] wasn't any way they could get any gain.

Q. Did they get any gain? A. No.

Q. By the way, did you ever hear Mr. Bentson say anything about why it was necessary for him to borrow money in the United States?

A. At our first meeting with Mr. Bentson, he frankly stated that his finances were tied up in Canada—embargo of some kind, moving money from Canada into the United States, and that was the only reason that I can remember that he mentioned about.

Q. Now, did he take any part in that meeting down at the bank there on July 2nd?

A. He takes the same part as anybody else did. He was part of the overall picture in it.

Q. Was he there during the entire part of the meeting? A. Oh, yes; yes, he was.

Q. Did you receive any part of the sums paid by—paid to Mr. Bentson or to ABC?

A. No, I didn't receive any of it.

Q. Did any of the other stockholders receive any of it, so far as you know?

A. No, the check went back to Bentson, and I understand he endorsed it over to the ABC.

Q. No other stock was redeemed at that time, was there? A. No. [92]

Q. Was any intended to be redeemed other than his? A. No, there wasn't.

Q. Or cancelled out?

(Testimony of A. L. Schneider.)

A. No, there wasn't; there wasn't.

Q. Did you ever have any interest of any kind in Mr. Bentson's three hundred and fifty shares?

A. No, I had no interest in it.

Q. Did any of the others have any interest in it?

A. No, they didn't.

Q. Now, you were the Manager of that company at the time of the redemption, were you not?

A. Yes, I was.

Q. There was, on—when did you start to be the Manager? A. In July the 2nd, 1945.

Q. All right, there was an item represented by an invoice, made by Mr. Davidson—item which is Exhibit C, and it was paid by the Oregon Motor Stages, was it not? Do you know about that?

A. I don't know what Exhibit C is.

Q. Here is an Exhibit C, on the stipulation of an invoice from Mr. Davidson—do you know how that was handled on the—on the Oregon Motor Stage books?

A. (After examining Exhibit) No, I don't. That was—there is an account number there, but I don't know what that account number—what that account number is. I presume—I presume that this was—
(interrupted) [93]

The Court: We don't wish speculations.

Mr. Jones: What was that?

A. I couldn't tell.

Mr. Picco: If he doesn't know, don't testify.

Q. If you don't know— (interrupted)

(Testimony of A. L. Schneider.)

A. No, I don't know how that was handled—I don't know what that account number 4620 is.

Mr. Jones: All right. You may cross examine.

A. I want to make one correction in my testimony. I said that I gave Mr. Royce a check that day. I believe it was several days later, because we were in a hurry in the bank that day, and I can't remember whether I gave him a check, or I paid him a few days later on that or not. I remember we were in a hurry that day. I testified, to clarify myself, that I gave him a check that day, and then he took—he took my check and certified his own check for the stock, but as I recollect now, I believe it was maybe a few days later that I gave him the check. I don't know if it was right at that time, and I want to clarify that, because I am not quite certain.

Cross Examination

Q. (By Mr. Picco): Well, on that—on that subject, you borrowed the money to buy the stock from the Petitioner, Ezra Royce, at that time?

A. No. I didn't borrow the money. In other words, he accommodated me for a day or a few days there, until I could—could take care of the money.

Q. You later picked up the stock of Mr. Niederkrome?

A. That is correct.

Q. In 1946?

A. That is correct.

Q. Did you pay for that stock?

A. I paid partially for it. It never was paid in full, and when we liquidated the organization, why, we made our adjustments.

(Testimony of A. L. Schneider.)

Q. You mean you paid only a part for it?

A. That's correct.

Q. Did you give a note or something for that?

A. Yes, I believe I had a note on that, for the amount.

Q. Was the note ever cancelled? A. Yes.

Q. You paid up the note?

A. No, the note wasn't paid up in full. But when we—when the corporation was liquidated, why, we made our offsets on it, and Mr. Royce—in other words, when we divided up the—in the liquidation, why, there was an offset made for that, between ourselves.

Q. Wasn't that a little unusual way of settling up that account?

A. No, I don't think so. It was—it was just a matter of—of figuring out where you stood on any particular item. I don't think it was unusual. It would be one way if he would pay me, and then I would pay him back—would be the same thing—was a matter of where—where we broke even on the transaction.

Q. You and Mr. Niederkrome were in on quite a few of these [95] ventures, were you not? Together?

A. No. I never was in—as far as I know, that is the first time that I had been—ever been associated in any deal with Mr. Niederkrome.

Q. You were associated with Mr. Royce on other occasions?

A. Yes, I was. There might have been some other—some other deal that we were associated, but

(Testimony of A. L. Schneider.)

I can't remember anything of any importance, at least.

Q. Now, you stated that on or about July 2, 1945, you and the other Petitioners in these proceedings presumed that the war would go on for a long time—that is correct, isn't it? A. Yes.

Q. Just how long did you think the war was going to continue?

A. Well, we were doing a lot of second-guessing, like anyone else. Somebody thought it would go on for a year, some people thought two years, and I suppose you could balance them all up, why, probably a year and a half, two years, they thought it would go on, because they figured that it would take a long time to drive the Japs out of these holdings that they had taken over.

Q. The German war had ended, had it not, some time before that? A. That's correct, yes.

Q. Now, you mentioned that the revenues started to go down after the soldiers started to go home. Now, that was some time after that, wasn't it? In '46? [96]

A. Well, your revenues—your revenues declined in '46. There was an immediate effect—immediate effect on your overall traffic.

Q. The gross revenues for 1945 were excellent, weren't they?

A. '45, as I remember, around two million four hundred thousand, or, I am guessing at the odd figures on that.

(Testimony of A. L. Schneider.)

Q. Then the revenues for 1946 started to decrease? A. Yes, they did.

Q. They were substantially in excess of a million dollars, however, even in 1946, weren't they?

A. Yes, they were.

Q. And then there was a pick up after that, wasn't there?

A. Then in 1947 there was a pick up.

Q. Now, you mentioned also that Mr. Bentson indicated that there were war restrictions on his funds, and that was the reason why he didn't have any money?

A. He said there was an embargo on moving any monies out of Canada into the United States.

Q. You also felt that the war might last a long time, did you not?

A. We felt that it would probably last, as I stated—— (interrupted)

Q. Weren't you rather worried about pledging your stock under those circumstances—that if he wasn't able to pay it, you might lose your stock?

A. It was my understanding that—that the notes of—the note that Mr. Bentson had, was a renewable—in other words, he could continue that on.

Q. Where did you get that understanding?

A. I understood that from Mr. Jacob and Mr. Royce.

Q. Did you see the note?

A. It was a ninety-day note, as I remember, and they stated that it could be renewed from time to time.

(Testimony of A. L. Schneider.)

Q. You did know that the note was signed by Mr. Royce—Ezra Royce, did you not?

A. I understood that they had to have an endorser from the United States—citizen of the United States endorse it, yes.

Q. Now, is that reason perhaps why you didn't—you weren't worried about whether the war restrictions would be lifted or not, on Mr. Bentson's funds?

A. No, I felt this way about it, that if the same tempo of earnings of Oregon Motor Stages would continue as they had, that Mr. Bentson would have been able to make substantial payments on the note, and insofar as the balance of it was concerned, I—we at all times, our group in Portland had the control of the corporation, so we were in position—we were not in too much danger, I didn't feel.

Q. It was possible to do exactly what was done—to buy up—to have the corporation use the earned surplus to buy up the stock, too, wasn't it? [98]

A. That was one possibility, but if the—if the note was reduced by earnings that Mr. Bentson would receive, it would be down to a point where the danger—wouldn't be any danger in it. That is the way I felt about it personally. I don't know how the rest of them felt.

Q. You also stated that you talked to Mr. Bentson concerning his attitude about the war, did you not?

A. His attitude about the war? I talked to Mr. Bentson after the—after the war was over.

(Testimony of A. L. Schneider.)

Q. Before—I am trying to get back to your direct examination. I thought you testified that some time around August 31, 1945, that is when he—that Mr. Bentson submitted his letter offering to sell the stock to the corporation. The matter of attitude about the war came up, and you said you saw him about that about that time, is that correct?

A. That is correct, yes. Or a day or two—right around that time.

Q. Are you saying that he was around here August 31, 1945?

A. I think it was shortly before that, or I can't remember exactly. I know that prior to—after the war was over, he was—I saw him after that.

Q. Well, the war was over at what time? When? You mean the war with Japan? A. Yes.

Q. That was over in August some time? [99]

A. It was over in August some time, as I remember, yes.

Q. And you saw him after that?

A. Yes, I did.

Q. Now, you also stated that you conducted some surveys on the routes of Oregon Motor Stages, that was before the stock was ever bought, with Mr. Bentson?

A. Yes, that was—oh, perhaps a couple of weeks before. I don't know exactly the date on it. It has been quite a while.

Q. You stated it was around June 15, or June 20 of 1945?

A. It could have been around in that period.

(Testimony of A. L. Schneider.)

Prior—a week or two before, as I remember, before the transaction was completed.

Q. Was he here for a long time during that time?

A. It seemed like he was here at that time for about a week. He might have been here longer. I can't say, but I saw him there—I went back to Medford for a few days in between each of these meetings. I had the business down there, and I had to—I'd go back and forth, and he might have been here longer than that, I can't say.

Q. Where did you say you met him originally?

A. I met him at the home of Mr. E. Royce.

Q. Do you know where he was staying? Mr. Bentson was staying?

A. Well, the night that we were out there, he was staying at Mr. E. Royce's home that night.

Q. Was his wife along with him? [100]

A. If—I don't think so. If she was, I didn't meet her. I never did meet Mrs. Bentson, that I can remember.

Q. From your knowledge then, you—you say that he was around for about two weeks up to July 2nd, 1945? He was—— (interrupted)

A. Well, to my knowledge—to my knowledge on that particular trip, I'd say he was here for a week to my knowledge. I said—what I said, he could have been here longer, because I left for Medford and back, I couldn't say that.

Q. Now, from your knowledge, when—he was here on July 2, 1945, also, wasn't he?

(Testimony of A. L. Schneider.)

A. Yes, he was here then.

Q. And later?

A. Yes, I believe I saw him after that.

Q. Was he—did you see him at the end—during July, the middle of July?

A. I can remember—I can remember at least one time, Mr. Bentson dropping into the office, after the meeting on July the 2nd, and I don't know, it might have been a couple of weeks later; it might have been towards the end of July. I remember one time him coming into the office, one afternoon.

Q. Now, what about August, was he around Portland in August?

A. He was in August—he was in Portland one time in August too.

Q. That is—— (interrupted) [101]

A. That was the latter part of August, I believe.

Q. Was that when he talked to you about his attitude about the war?

A. Yes, I believe it was—that was the time.

Q. And as far as you know, when did he leave to go back, or did he go back to Vancouver, British Columbia?

A. Oh, I don't know; I don't know about that. I saw Mr. Bentson—he dropped in once or twice after—after he had sold his stock too, that I remember.

Q. You mean around—right after July 2nd—I mean, after September 6th?

A. Yes, I mean, maybe a month later, or something like that.

(Testimony of A. L. Schneider.)

Q. He was in town again?

A. Yes, he—I guess he came to town quite often.

Q. Do you remember whether he came with his wife at all?

A. I never did meet his wife. That I can remember.

Q. Mr. Bentson was a rather elderly old man, wasn't he?

A. Yes. I don't know, I kind of judged him at about—I wouldn't—getting to the point where I don't call that elderly. I thought he was around sixty-five, somewhere around that age. That's my guess.

Q. Now, what was the purpose of the corporation redeeming the three hundred and fifty shares of stock?

A. What was the purpose of it? He made this—he made this offer to sell it back to the corporation. We had had a reserve [102] which we felt that we were going to expend, and purchase some new equipment. We had purchased, just prior to our buying the stock of the corporation, we had obtained some new equipment, and we felt that it was going to be necessary to get—if the tempo of the flow of traffic would continue, to purchase additional equipment. With the theory that the traffic would diminish, we felt that it wasn't going to be necessary to go out and purchase additional equipment. We had considerable equipment that would—could—would be necessary to trade it in, because it would not be standard for civilian traffic, as it were.

(Testimony of A. L. Schneider.)

And we thought with the decrease in traffic that it would be quite some time before it would be necessary for us to add additional equipment to the fleet, therefore, we did have the money to purchase this stock, and which we did, and retired it.

Q. And you had intentions to maintain your volume of business, did you not? A. Pardon?

Q. You had intentions at that time to maintain your volume of business?

A. No, we—we were afraid of the fact that we wouldn't be able to maintain the volume of—the volume we did. We had to take more or less the records that we had prior to the war, and figure that it would reach its level.

Q. You were planning to service the people who wanted to use the routes, and those buses of yours, were you not?

A. Oh, yes, we were planning on services, that is the only way [103] you can hold your business.

Q. And your capital was sufficient to take care of all of that?

A. Our capital? No, I said our equipment was—— (interrupted)

Q. Your equipment was sufficient to take care of it?

A. Yes, our equipment was sufficient to take care of it. In other words, there was more equipment available to the public at the end of the war than there was available to the public prior to the war. By having the equipment during the period of the war, we had more equipment available to that

(Testimony of A. L. Schneider.)

same public that was going to ride at the end of the war than we had prior to the war.

Q. Of course, some of your buses weren't streamlined, or anything like that, were they?

A. The last twenty buses that were put into service, which were thirty-four passenger Aero coaches, and twenty-nine passenger Clippers were all streamlined buses. Then, those that were purchased prior to that time—in fact, the whole fleet was made up of Clippers which is a twenty-nine passenger bus, for your sparsely-settled runs, and the Aero coaches. Then, we had, in addition to that, considerable what we call junk. I mean, you call that junk in the open market as far as hauling passengers is concerned. We had a lot of school bus types, which we felt were available for trade-in and for sale—couldn't be used.

Q. At the time of considering Mr. Bentson's letter of August 31, 1945—his offer to sell the stock to the corporation, did you consider the matter of selling—of trying to get interested buyers in [104] to buy his stock?

A. I only talked to one person regarding it, and it was a man that had been interested before, and he told me that he had—that he had been advised to not invest in any short-line bus line.

Q. The—as far as the Directors were concerned, that matter wasn't considered at all, was it?

A. I don't know that they—that any of the rest of them approached anyone or not. I just ap-

(Testimony of A. L. Schneider.)

proached this one man — who was transportation minded.

Q. Who was that individual?

A. Mr. Rothchild.

* * * * *

EZRA ROYCE

a witness called on behalf of the Petitioners, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record?

The Witness: Ezra Royce.

Direct Examination [105]

Q. (By Mr. Jones): Mr. Royce—— (interrupted)

A. 628 N. W. 6th Avenue, Portland, Oregon.

Q. I take it you just gave your address to the—— (interrupted) A. Yes.

Q. Mr. Royce, your wife is Dora F. Royce, is that correct? A. That's correct.

Q. And you and Dora F. Royce, your wife, are the Petitioners in Docket Number 51526?

A. I don't know as I recognize that number.

Q. Well, we will stipulate that that is correct, is that right, Mr. Picco?

Mr. Picco: That is correct.

Q. Okay, and that you are the Petitioner alone in Docket Number 51527, the other docket, is that correct?

A. I don't know the number—— (interrupted)

The Court: He doesn't know the number.

(Testimony of Ezra Royce.)

Q. You will stipulate to that, Mr. Picco?

Mr. Picco: (Affirmative nod.)

A. I don't have those numbers in my mind.

Q. Thank you. How long have you and Mrs. Royce resided in Portland?

A. Well, I have lived in Portland since 1904. It is fifty-one years.

Q. And—— (interrupted) [106]

A. And she, since 1920, about thirty-five years.

Q. You were married in 1923? A. 1923.

Q. Mr. Royce, do you—did you and Mr. B. Royce, your brother, Mr. Schneider, Mr. Niederkrome and Mr. Jacob enter into a sale—purchase and sale of where you all bought four hundred shares of the stock of Oregon Motor Stages on the 2nd day of July, 1945? A. Yes, we did.

Q. Now, will you—did you have anything to do with the negotiations that led up to the purchase of that stock? A. Yes, I did.

Q. Who first brought that to your attention?

A. Mr. Schneider.

Q. All right, will you tell us what was done with respect to your negotiations for that—acquiring that?

A. Well, when I first heard about it, I thought it over a few days, and then I got on the telephone to Mr. Ackerman (phonetic).

Q. Who is Mr. Ackerman?

A. He is the President of Greyhound.

Q. Continue, please?

A. Asking him if he would like to participate in

(Testimony of Ezra Royce.)

it. He said he thought they would be interested. Then we talked back and forth on the telephone, oh, probably eight or ten times in the next three or four days, and finally, turned her down. [107]

Q. And then what, Mr. Royce?

A. Then a little later, I talked to Mr. Rothchild about it.

Q. Is he the gentleman from San Francisco?

A. Yes, and also took a trip to Seattle, and talked to Mr. Wenck about it.

Q. All right, and then?

A. Mr. Wenck came down and spent two or three days here, and then he finally—— (interrupted)

Q. Then he what?

A. He finally——turned it down.

Q. And then what did you do?

A. Then we——Mr. Bentson came down from Vancouver. On one of his periodical visits, and I was telling him about it. The idea seemed to appeal to him, so he became interested, and we finally consummated a deal with—— (interrupted)

Q. Well, had you talked to Mr. Jacob or Mr. Niederkrome or Mr. Schneider prior to Mr. Bentson coming down?

A. Oh, yes. A good many times, yes.

Q. All right. How many shares of stock had collectively——had you and Mr. Jacob, Mr. Niederkrome, Mr. Schneider and your brother agreed to buy before the time Mr. Bentson arrived?

A. Four hundred.

(Testimony of Ezra Royce.)

Q. And what was your idea with respect to the other three hundred and fifty?

A. Well, we thought that four hundred was all we were interested [108] in, and so when Mr. Bentson came along, he seemed to be interested in the other three hundred and fifty.

Q. And then what—did you tell—did you tell anybody about that—his desire there?

A. Of our group?

Q. Yes. A. Oh, yes.

Q. You conveyed it to the rest of them?

A. Oh, yes.

Q. And did you arrange for them to meet him?

A. I believe the—Mr. Jacob and Mr. Schneider came out to my house and met him there.

Q. Was that discussed at your house?

A. Yes.

Q. After this meeting and discussion, was he accepted into your group as one of the buyers then?

A. Yes, he was.

Q. All right. Now, had you ever visited in Vancouver—visited Mr. Bentson in Vancouver?

A. Oh, yes, many times.

Q. What relation are you to Mr. Bentson?

A. He was my uncle.

Q. And do you have a sister living here in town—or did you have? A. No. [109]

Q. Well, who was the niece that he had here?

A. I have forgotten her name. I know her married name, but her single name I don't recall it. Her married name is Mrs. Orsen.

(Testimony of Ezra Royce.)

it. He said he thought they would be interested. Then we talked back and forth on the telephone, oh, probably eight or ten times in the next three or four days, and finally, turned her down. [107]

Q. And then what, Mr. Royce?

A. Then a little later, I talked to Mr. Rothchild about it.

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Q. Well, had you talked to Mr. Jacob or Mr. Niederkrome or Mr. Schneider prior to Mr. Bentson coming down?

A. Oh, yes. A good many times, yes.

Q. All right. How many shares of stock had collectively——had you and Mr. Jacob, Mr. Niederkrome, Mr. Schneider and your brother agreed to buy before the time Mr. Bentson arrived?

A. Four hundred.

(Testimony of Ezra Royce.)

Q. And what was your idea with respect to the other three hundred and fifty?

A. Well, we thought that four hundred was all we were interested [108] in, and so when Mr. Bentson came along, he seemed to be interested in the other three hundred and fifty.

Q. And then what—did you tell—did you tell anybody about that—his desire there?

A. Of our group?

Q. Yes. A. Oh, yes.

Q. You conveyed it to the rest of them?

A. Oh, yes.

Q. And did you arrange for them to meet him?

A. I believe the—Mr. Jacob and Mr. Schneider came out to my house and met him there.

Q. Was that discussed at your house?

A. Yes.

Q. After this meeting and discussion, was he accepted into your group as one of the buyers then?

A. Yes, he was.

Q. All right. Now, had you ever visited in Vancouver—visited Mr. Bentson in Vancouver?

A. Oh, yes, many times.

Q. What relation are you to Mr. Bentson?

A. He was my uncle.

Q. And do you have a sister living here in town—or did you have? A. No. [109]

Q. Well, who was the niece that he had here?

A. I have forgotten her name. I know her married name, but her single name I don't recall it. Her married name is Mrs. Orsen.

(Testimony of Ezra Royce.)

Q. Well, what — what means did Mr. Bentson have?

A. Well, he was—he was a man that had been pretty well off for a good many years, and made his money in mining on the beach at Nome, in about 1902 or 3, along in there. Made several hundred thousand dollars in just a few weeks, so then he came out and decided he wanted to live in Vancouver, due more or less to his wife. I think she had a brother or two that lived in Vancouver. Went into the sawmill business there.

* * * * *

Q. Had there ever been any conversations between you and Mr. Bentson prior to June or July of 1945, with respect to his going into any business in the United States?

A. Yes, there had been.

Q. Would you explain?

A. Several times, he indicated to me that he would like to get into something that Barney and I were interested in. [110]

Q. Now, how did you happen to mention this particular opportunity to Mr. Bentson?

A. Well, he was down here on a visit, and just casual conversation first. And he seemed to be interested, so that is how—— (interrupted)

Q. Said he wanted to go into it?

A. Yes.

Q. All right, now, I want to clear up this one point that I don't think I quite understand—maybe the rest do, but I don't. Did he have a niece here?

A. Yes.

Q. What relation was she to you?

(Testimony of Ezra Royce.)

A. None.

Q. Well, I got that a little bit—that's all right. I will not ask any more questions. Now, did he indicate why he wanted to go into this particular venture here in Portland?

A. Well, he—after he investigated this pretty thoroughly, and he thought it was a good business deal, and he would like to create an estate here in Oregon for his niece.

Q. How did it come that this loan was made, of three hundred and fifty thousand from American Business Credit Corporation?

A. Well, his funds were frozen in Canada due to the war, I think, and of course he couldn't get any money out of Canada. Therefore, he wanted to make some kind of an arrangement here in the States to handle it. That is how the loan matter came up.

Q. And how was that arranged?

A. It was arranged through the American Business—ABC, I guess, they call it, through a Mr. Davidson. Mr. Jacob introduced Mr. Davidson to Mr. Bentson and myself.

Q. Now, who made the application for the loan?

A. He did.

Q. Who do you mean by "he"?

A. Mr. Bentson.

Q. What was—what were the requirements of American Business Credit Corporation with respect to making the loan?

A. Well, they wanted—they wanted somebody to sign on his note.

(Testimony of Ezra Royce.)

Q. In what capacity?

A. Well, I signed it as an accommodation to him.

Q. Did they understand that when you signed it?

A. Yes, they did.

Q. I will show you the Exhibit—this will be the Stipulation Exhibit Number 1—is the note to which you refer (note exhibited)?

A. That's right.

Q. That is a promissory note for three hundred and fifty thousand dollars?

A. That's correct. [112]

* * * * *

Q. Now, did — what other requirements did American Business Credit Corporation impose on this?

A. Well, they wanted—they wanted the group of us to put our stock up as collateral.

Q. Was that done? A. That was done.

Q. Now, did you loan this stock to Mr. Bentson for that purpose? A. Yes.

Q. Did you get a receipt from him?

A. Yes.

Q. I will show you a receipt here, which is the Stipulation Exhibit 3, I believe—it's 3—it looks like a 3 on there in pencil, and ask you to look at it, and tell me if that is the—the receipt that he gave you?

A. That is the receipt. That is the original receipt, yes, sir.

Q. All of the original group, that is, yourself, your brother, Barney Royce, Mr. Jacob, Mr. Nie-

(Testimony of Ezra Royce.)

derkrome and Mr. Schneider signed identical receipts?

A. They each had identical receipts, yes.

The Court: Do you have any interest in the ABC?

The Witness: No; no.

The Court: Did any of your associates?

The Witness: No, until I met Mr. Davidson through Mr. Jacob—it was brand new to me.

Q. Now, were you at that meeting down at the First National [113] Bank, where this purchase and sale was concluded? A. Yes, I was.

Q. That is on July 2nd of '45?

A. That's right.

Q. Now, did you have any interest at all in the three hundred and fifty shares of stock that was purchased by Mr. Bentson?

A. No, I did not.

Q. Were they in any way purchased for you?

A. No.

Q. Were they purchased for the benefit of any of the other men whom I have mentioned, who are Petitioners here? A. No, they were not.

Q. Now, what was your attitude, Mr. Royce, at the time—in the latter part of June of 1945 up to and including the time this sale was consummated on the 2nd of July '45 — what was your attitude toward the probable earnings of the company?

A. Well, I thought the earnings of the company should be very good, especially if the war held on.

(Testimony of Ezra Royce.)

Q. Had you examined its past balance sheets and so forth? A. Oh, yes, I had.

Q. And what was your feeling toward the probable duration of the war at that time?

A. Well, I felt that it probably would continue on for a year or possibly two years.

Q. Now, in August of 1945, when the hostilities stopped, was there [114] any change in attitude on your part toward the progress the company could make?

A. Yes. I felt that we were—in losing that military business, it would be a considerable amount.

Q. And—— (interrupted)

A. Which it did prove to be.

Q. Now, do you know—did you talk with Mr. Bentson about the change in the international picture at that time? A. After the war?

Q. Yes.

A. I don't—recall—it seemed to me that it was here—whether I talked to him just at that time or not, I don't know.

Q. Well, in the latter part of August—I will put it this way—strike that. May I see the Exhibit 9—do I have that, or do you? I am handing you what is Stipulation Exhibit 9, a letter from Mr. Bentson to Oregon Motor Stages. Do you recall being at a Directors' and Stockholders' meeting of Oregon Motor Stages when that was submitted and acted on? A. Yes, I do.

Q. Do you know whether, at any time prior to

(Testimony of Ezra Royce.)

that, can you recall when you talked to Mr. Bentson, about the subject matter that is in that letter?

A. About the—his selling his stock?

Q. Yes, sir.

A. No, I don't think so. [115]

Q. Well, did he ever express to you at any time his reason for wanting to sell the stock?

A. Yes, he did.

Q. What did he say?

A. Well, one reason was that the war stopped, and that worried him a little bit, thinking that possibly, the volume of business would drop off considerable. And the other was that he had just discovered that his wife had developed cancer of the throat, and which disturbed him a lot.

Q. Did he ask the corporation to buy his stock?

A. Well, he offered it to them, and due to the fact that the—that the emergency for new equipment and so on and so forth was passed then, due to—on account of the war's ending is the reason we decided it would be to the best interests of the company to do it.

Q. And the corporation voted to do that?

A. Yes.

Q. And did that include cancelling the stock too, of his? A. Cancelling his stock, right.

Q. That check was written by Oregon Motor Stages, which would be Stipulation Exhibit Number 10, for three hundred and fifty thousand, dated September the 6th, 1945, did you ever see the check—the original of that check?

(Testimony of Ezra Royce.)

A. No, I don't think so.

Q. Did you ever get any benefit out of that check yourself? A. None at all. [116]

Q. Did any part of it go to you or to any of the other stockholders?

A. Not to my knowledge, no.

Q. Did any of it—none of it went to you, did it?

A. No; none.

Q. I will take this. Now, did you get any gain—realize any gain of any kind out of his selling that stock and having it cancelled?

A. No, I did not.

Q. Did any of the others? A. No.

Q. Was it intended that you or the others get any gain? A. No.

Q. Did you expect to get any gain out of it?

A. I did not.

Q. Was there any agreement of any kind that you or any of the other stockholders would realize any gain out of that transaction? A. No.

Q. By the way, did he say anything to you about the time he showed an interest in this thing—well, I believe you have testified about his funds in Canada, didn't you? A. Yes.

Q. Now, how did you people come to loan this stock? A. Well, the ABC wanted it.

Q. Did you ever—at any time, in any way, ever express to ABC that this loan was for your benefit?

A. No, I did not.

Q. How did you happen to sign that note—what

(Testimony of Ezra Royce.)

was the explanation that ABC gave to you for wanting you on that note?

A. Well, I guess they thought it would make it look better.

Q. No, but what—did they give you any reason for asking you—why they wanted your signature on it?

A. I don't recall, except that they wanted a signer. Is the only thing I know.

Q. Was there anything mentioned by anybody about him being a Canadian citizen at the time?

A. Oh, yes; I think—I didn't think of that phase of it.

The Court: I can't hear you.

A. Yes, his being a Canadian citizen—that was the reason.

Q. But I believe you said that you—that they understood you were signing as an accommodation, Mr. Royce?

A. That is correct, yes.

Q. When did Mr. Bentson die?

A. I believe it was either in late '51 or early '52.

Q. Has either Mr. Niederkrome or Mr. Bentson had any interest in or connection with Oregon Motor Stages since they each parted with their stock?

A. They have not.

Q. Now, this redemption that was made was only of his own stock, wasn't it?

A. That's right. [118]

Q. It was not intended that any other stock be redeemed at the time?

A. No.

(Testimony of Ezra Royce.)

Q. Redemption wasn't for your benefit or for the other—— (interrupted)

A. Not at all, no.

The Court: How old was Mr. Bentson, at that time?

A. I believe when he passed away, he was eighty-one years old, but up until the last year, he was a man that looked much younger. To see him you would—well, he was very active. The last year he failed rapidly.

Q. Mr. Royce, did any part of the three hundred and fifty shares he purchased belong to you?

A. No.

Q. Did you have any interest in them?

A. None at all.

Mr. Jones: You may cross examine.

Cross Examination

Q. (By Mr. Picco): Mr. Royce, in negotiating for the purchase of the stock in Oregon Motor Stages, you were the principal organizer and promoter, were you not?

A. Well, I don't—don't know as I was. I think Mr. Schneider and Mr. Jacob were about as active in it as myself.

Q. You were very active in the—— (interrupted) [119]

A. They were about as active.

Q. And you were successful in getting other purchasers for the stock, who were interested in

(Testimony of Ezra Royce.)

buying, prior to the time Mr. Bentson came on the scene?

A. Well, there was Mr. Jacob, Mr. Schneider and myself, and my brother and Mr. Niederkrome. That was the size of it.

Q. You said that—— (interrupted)

A. Rather a close knit group, I would say.

Q. You did contact Mr. Rothchild and Mr. Wenck?

A. Yes, I did, and also Mr. Ackerman.

Q. And they were interested in buying at the time, were they not?

A. Well, they were—they seemed to be interested, but they turned it down.

Q. They were interested—they—they had been in other ventures with you, had they not, Mr. Rothchild?

A. Mr. Rothchild is a part owner of the Yellow Cab Company of Seattle. That was the only connection we had.

Q. Mr. Gus Wenck was—— (interrupted)

A. Mr. Gus Wenck is the Manager of the Yellow Cab Company of Seattle.

Q. How do you spell Wenck?

A. W-e-n-c-k.

Q. Now, did you hear Mr. Jacob testify this morning? A. Yes. [120]

Q. He stated that he was willing to buy additional shares beyond the allotted portion that was given to him.

A. I heard him make that statement, yes.

(Testimony of Ezra Royce.)

Q. He also indicated that other people were interested in buying that stock. Now, do you know that to be the truth?

A. Just at this time, I don't recall anyone that—that would—was willing to purchase any, but it could be that there was lots of people that would, but just at the moment, I don't recall anyone.

Q. You were ready and willing to buy additional shares of stock too, were you not?

A. No, I was not.

Q. You had paid for Mr. Niederkrome's stock, had you not?

A. I loaned Mr. Niederkrome the money for it.

Q. And you did the same for Mr. Schneider?

A. Well, in Mr. Schneider's case, I would hardly consider that a loan. I made him an advance for a few days was all, and he paid me back.

Q. You were intending to have the controlling interest in this stock—in this company, were you not?

A. No.

Q. After the stock transaction was completed, and the redemption was made, you did hold the controlling interest in the Oregon Motor Stages, did you not?

A. No, I had a hundred and forty-five shares. It would have taken over two hundred shares to have the control. [121]

Q. Now, you were very active in other ventures too, were you not, Mr. Royce?

A. Well, I was in the taxicab business, and the Gray Line business; had been for many years.

(Testimony of Ezra Royce.)

Q. And you were familiar with the other Petitioners in this case, on other ventures, were you not?

A. I don't know. Mr. Jacob, I don't believe I have been in any other venture with him.

Q. Well, Mr. Schneider, you were, were you not?

A. Mr. Schneider and I were in a partnership for a couple of years, but that has been closed out.

Q. Did you have an interest in the Burnside Realty Corporation? A. Yes, I did.

Q. You had the controlling interest at the beginning, did you not?

A. No, I did not. There were three people in it originally, ten shares each, and then it developed there were four, of seven and half shares each.

Q. You mentioned the Gray Line—what is that?

A. That is a sight-seeing company.

Q. Now, you had the controlling stock interest in the Gray Line?

A. No. My brother and I were in there equal.

Q. Fifty percent apiece?

A. Well hardly fifty. There is an outstanding share or two on the outside.

Q. Now, when did negotiations for the stock begin—the Oregon [122] Motor Stages stock?

A. Oh, I think probably — oh, probably two months before the deal was consummated.

Q. The deal was consummated on July 2nd, 1945? A. Yes.

Q. Now, you stated Mr. Bentson took a rather active part in these negotiations, did you not?

(Testimony of Ezra Royce.)

A. No.

Q. When did he get interested in the purchase of the stock?

A. Well, he was down here on a visit—staying at my house, and staying at my brother's house, and also visited his niece a few days around here and there. But his wife didn't come down with him.

Q. When was that, in June of 1945?

A. Yes, I think about in June.

Q. Well, did he stay during that entire time up to July 2, 1945, when the transaction was completed?

A. Yes, I think he stayed until just after that.

Q. You say that he stayed at your place?

A. He was there for a few days, and then he spent a few days at my brother's place, and a few days with his niece.

Q. That is Mrs. Orsen, you stated here?

A. That was Mrs. Orsen, yes.

Q. Was it customary for him to stay at Mrs. Orsen's home when he got here? [123]

A. Well, he used to stay around at various places, and generally, when he came down, he would go down to Silvertown and stay a few days too. He had some of his folks down there.

Q. He was about seventy-five or seventy-six years old at the time, wasn't he?

A. About—I think probably about seventy-four, thereabouts. Might have been seventy-five. I don't hardly think so.

(Testimony of Ezra Royce.)

Q. Now, did you see any financial statement about the funds he might have?

A. No, I did not.

Q. Was he a man of expensive habits?

A. Of what?

Q. Expensive habits? A. No, he was not.

Q. Was he a lavish spender of any kind?

A. No, I wouldn't say so, no.

Q. Now, in the negotiations for the loan, you dealt primarily on that thing, did you not? You were the active negotiator for the loan?

A. You mean with ABC?

Q. That is correct. A. No, I was not.

Q. Who was? A. He was.

Q. Mr. Bentson? [124] A. Yes.

Q. Now, did you deal with George W. Davidson, who was the Manager of ABC at that time?

A. I was there when Mr. Bentson dealt with him, yes.

Q. He is now dead? A. Who?

Q. Mr. Davidson is now dead?

A. Oh, yes; yes, I believe he is.

Q. And ABC, the Portland office, has been closed for many years, hasn't it?

A. I don't know.

Q. Now, you approached George W. Davidson for a loan, did you not?

A. No, I don't think so. I think—I was with Mr. Bentson when he made the arrangements for the loan.

Q. Did you discuss the matter with Mr. David-

(Testimony of Ezra Royce.)

son and tell him that you were interested in getting a loan? A. No.

Q. Mr. Davidson relied upon your credit and reputation, did he not?

A. Well, of course, I don't know how he felt about it, but he had no reason to. I didn't represent that I was making a loan to him.

Q. Did Mr. Davidson see Mr. Bentson at all?

A. Oh, yes. [125]

Q. You introduced him to him?

A. Mr. Jacob introduced him to him. As well as myself.

Q. Did Mr. Davidson request your personal net worth, or financial statement?

A. I don't recall.

Q. You submitted one, however, did you not, to Mr. Davidson, or to the American Business Credit Corporation?

A. It's possible, but I am not sure.

Q. Now, no financial information was required of Mr. Bentson, is that correct?

A. That, I can't say.

Q. And none were actually submitted?

A. I couldn't say that either; I don't know.

Q. American Business Credit Corporation looked to you for payment, is that right?

A. I don't think so.

Q. Now, they had you sign the note as a maker?

A. No, as an accommodation on account of his situation.

Q. You did sign the note as a maker?

(Testimony of Ezra Royce.)

A. Yes, I signed the note, but as an accommodation maker.

Q. You have read the note too, haven't you?

A. Yes, I just read it a few minutes ago.

Q. You understood, did you not, that ABC could collect this money from you on this note?

A. Well, I suppose that if they found it necessary, they probably [126] could.

Q. Now, why was the check made out payable to you and Mr. Bentson, if you didn't have anything to do with it?

A. Check made out—what check?

Q. The check for three hundred and fifty thousand dollars—the loan that was obtained from the American Business Corporation—Credit Corporation?

A. I don't recall that.

Q. You do know that the check was made payable to you and Mr. Bentson?

A. No, I don't. If it was, I have forgotten it. I don't recall that.

Q. Wasn't the check turned over to you?

A. I don't think so. I don't recall that.

Q. Do you have the check—do you have the number of the exhibits that has that check? On these petitions, if your Honor please, I would like to state for the record that Respondent's Exhibit B is a check dated July 2, 1945, in the amount of three hundred and fifty thousand dollars, payable to Mr. Bentson and Mr. Royce. That has been stipulated by the parties. Didn't you endorse that

(Testimony of Ezra Royce.)

stock—that check for three hundred and fifty thousand dollars?

A. I don't recall it. The check will have to speak for itself. I just don't remember it.

Q. This is the Exhibit which shows the check—the reverse side of it. Will you just see whether that is your name that is shown [127] on there?

A. Yes, it is.

Q. It is made payable to you, and it was endorsed by you, is that correct?

A. Payable to L. R. Bentson and E. Royce.

Q. And on the reverse side of the check, your signature appears on it?

A. That's right. I had forgotten it.

Q. Now, Mr. Davidson of American Business Corporation—Credit Corporation, required that all of the stock be pledged as collateral for the loan of three hundred and fifty thousand dollars?

A. Yes.

Q. Why did you pledge your stock—because of that reason, is that right? A. Yes.

Q. You knew or understood that the three hundred and fifty shares of stock would later be redeemed by the corporation? A. I did not.

Q. You knew that the note would be paid out of the corporate funds? A. Pardon me?

Q. Did you know that the note would be paid out of the corporate funds of Oregon Motor Stages? A. Did I know that?

Q. That is correct? [128]

(Testimony of Ezra Royce.)

A. You mean when it was, or did I know it previously?

Q. When you transacted this loan? A. No.

Q. You knew, did you not, that Mr. Bentson would not pay for the stock? A. No, I did not.

Q. You testified here on direct examination that his funds were blocked by the Canadian Government?

A. That's—that's right, funds from Canada, yes, but he—if the business ran along, why, he could pay for it—and made arrangements.

Q. And that was the theory you were operating on, that——(interrupted)

A. That was the theory he was operating on.

Q. You understand that if he wouldn't have paid, you would have had to pay?

A. Well, it could possibly have been that way.

Q. Did Mr. Bentson operate—or participate in the operation of the business at all?

A. Participate in the operation of the business? He wasn't in very long.

Q. He wasn't—was he—he wasn't made a Director, was he? A. No, he wasn't.

Q. Why wasn't he made a Director at the same time you people [129] were?

A. I don't think he was interested in being a Director. I never heard him express any interest in that line.

Q. What was the purpose of the redemption of the stock?

A. Well, the—he offered—he offered to sell it,

(Testimony of Ezra Royce.)

and due to the fact the war had ended, the need for additional equipment wasn't acute any longer, so it was deemed advisable to complete the deal.

Q. Did you consider at that time of buying of his shares rather than using the money of the corporation?

A. We thought it would serve the best interest of the company.

Q. As a matter of fact, you were thinking in terms of the future of the company too, were you not, at that time?

A. Thinking of the future of the company? Yes.

Q. You were anticipating that the population would increase in the west?

A. Well, it had been increasing.

Q. And you were looking forward to an increased business from that standpoint?

A. Well, after the war stopped, it sort of cooled us off a bit on the increase in business for some time at least.

Q. Of course, the war stopping suddenly there didn't have an immediate effect on your business, did it?

A. No, it didn't have an immediate effect on the business, but it had an immediate effect on us, the group of us as operators. We didn't see the profit in sight, of course, that we did previously. Which [130] proved to be true.

Q. Actually, Mr. Bentson was never intended to hold the stock except for this short period of time, was he?

(Testimony of Ezra Royce.)

A. You say he was never intended to hold it? I don't know what his plans were otherwise, but as far as I knew, he intended to hold it.

Q. Now, I hand you Exhibit 9, it is attached to the Stipulation, and ask you if you recognize that—that purports to be a letter, does it not, dated August 31, 1945, signed by Mr. Bentson?

A. That's right.

Q. To the Oregon Motor Stages? And you accepted the offer that was stated in there?

A. Yes.

Q. You signed your name there?

A. As President of Oregon Motors.

Q. Now, in this letter, he offers to sell the stock for the same thing he paid for it, on condition that the interest be paid on the note?

A. That's right.

Q. Now, do you know that part of that interest had been paid before this letter, is that correct?

A. No, I did not.

Q. Didn't know anything about that matter?

A. No.

Q. Now, I notice that the address, Vancouver, British Columbia is on there. Will you look at that? It appears that there is an erasure on that original letter? [131] A. Where?

Q. Right here. (Indicating) Does it appear as if the——(interrupted)

A. It is a little——(interrupted)

Q. ——word "Washington" was put in there first?

(Testimony of Ezra Royce.)

A. I don't know. It looks like there has been an erasure, but I don't know what it would be.

Q. Now, you know who prepared that letter?

A. I don't know.

Q. Now, you testified Mr. Bentson was down here August 31, 1945?

A. I don't know where he had it prepared. He probably——(interrupted)

The Court: I can't hear you.

A. He probably wrote the letter himself, as far as I know.

Q. This letter seems to be coming from Vancouver, British Columbia, yet, the testimony here today, including yourself's, indicate that he was in town on August 31, 1945, and a few days before that.

A. Not my testimony.

Q. Didn't you say you talked to him about his attitude or—concerning the war, in and around that date?

A. Not that date, no.

Q. What date were you talking about?

A. I said probably some time in August. The date, I don't know.

Q. You consider that stock to be worth one thousand dollars a [132] share even on September 6, 1945, did you, or did you not?

A. Well, yes, I suppose it was.

Mr. Picco: That will be all, your Honor.

Redirect Examination

Q. (By Mr. Jones): I would like to ask one question. Where does your brother live?

(Testimony of Ezra Royce.)

A. In Santa Barbara.

Q. Where did he live in 1945?

A. He lived out of Vancouver on the Evergreen Highway, on the north bank of the Columbia River.

Q. How far out of Vancouver?

A. About seven or eight miles.

Mr. Jones: That's all, thank you.

Recross Examination

Q. (By Mr. Picco): Just one or two other questions. You knew that the check that Oregon Motor Stages made out to Mr. Bentson on July 6, 1945, in the amount of three hundred and fifty thousand dollars was to be used to pay off the note, didn't you, or did you not?

A. Your question isn't quite clear to me.

Q. Did you know that the check that Oregon Motor Stages made to Bentson was to be used to pay off the note that was signed by you and Mr. Bentson?

A. I don't—I still don't understand your question. I didn't know [133] there was a check made on July 6th.

Q. I understand that the Directors decided to redeem the stock—purchase the stock from Mr. Bentson—that is right, isn't it?

A. Wasn't that September the 6th?

Q. September 6, 1945? A. Oh, yes.

Q. What?

A. That's right, they decided to purchase the stock, that is correct.

(Testimony of Ezra Royce.)

Q. Oregon Motor Stages paid three hundred and fifty thousand dollars by check to Mr. Bentson at that time? A. That's right.

Q. Now, you knew that that was going to be applied on the note that was signed by you and Bentson? A. Well, I suppose so.

Q. Now, did that have any bearing on—on the——(interrupted)

A. I don't know as I—I don't know was I——(interrupted)

Q. ——reasons why the corporation was called to buy the stock?

A. I don't know as I ever saw that check myself. I don't believe I did.

Q. Didn't you act on that matter of redemption?

A. Yes, we did, as a group. [134]

* * * * *

Redirect Examination

Q. (By Mr. Jones): Mr. Royce, did you obtain some money—some twenty thousand dollars in 1945, in December, for the Hippodrome Amusement Company?

A. You mean—from the Hippodrome Amusement Company?

Q. Yes. A. Yes, I did.

Q. And what was the nature of the transaction by which you received that money?

A. You mean how did I——(interrupted)

Q. No, I don't mean the check or anything, but I mean, what was the understanding——(interrupted) A. Oh, as a loan.

(Testimony of Ezra Royce.)

Q. And with whom did you have that understanding?

A. With my brother, Barney, and with Mr. Niederkrome.

Q. Are they in any way interested in the Hippodrome Amusement Company?

A. Yes, they are. Both stockholders. [165]

Q. Who are the stockholders of that?

A. There is Mr.—a man by the name of Mr. Bartel (phonetic), and Mr. Niederkrome, Mr. Barney Royce and myself.

Q. And who are the Directors?

A. Mr. Barney Royce, Mr. Niederkrome and myself.

Q. And where was this understanding had about your making this—borrowing from the Hippodrome Amusement Company?

A. At our office. 628 N.W. 6th Avenue.

Q. Does Mr. Niederkrome do the accounting for the Hippodrome? A. Yes, he does.

Q. Where is the Hippodrome properties?

A. In Seaside, Oregon.

Q. What—will you describe those properties?

A. The Hippodrome Amusement Company owns one entire block in the center of Seaside, and then has another part of a block about a hundred and fifty feet in width, and about four hundred and fifty long, also right in the center of Seaside.

Q. Well, now, what were those properties used for prior to 1945?

A. The part of it was buildings that we built

(Testimony of Ezra Royce.)

for rental purposes, and which has been rented continuously, and then, the part of the other building, the large building, was used for rental purposes, the part that fronts on Broadway Street, and the rest of it was used for a dance hall.

Q. Is the dance hall still in operation? [166]

A. No.

Q. And have you had any other intentions, or any intention to do something else with that building?

A. Well, we did plan to have a sort of a place for public meetings, at Seaside for conventions and so on, but we had a plan to build another building on the piece of vacant ground, originally planned to build it for Oregon Motor Stages, because it is a much more central location than what they had; and that didn't materialize.

Q. Why?

A. Well, the Oregon Motor Stage business was falling off rapidly, and they didn't feel it advisable to change the location.

Q. That plan didn't go through then?

A. That plan didn't go through.

Q. Did you have any other plan to use this property for some other purpose?

A. Yes, we had the negotiations with the United States Post Office Department, and those negotiations carried on for some time, and they went so far as to submit a plan to their Regional Office in Seattle, and the plan was approved, and after some alterations by their staff in Seattle, and then it was

(Testimony of Ezra Royce.)

resubmitted back to our architect, and the plan was finally approved by the Post Office Department, and was forwarded to Washington.

Q. Was that a preliminary sketch that you sent back? A. Yes.

Q. Who made it? [167]

A. Universal Plan Service—Mr. Bolen (pho-netic) and Mr. Byers (phonetic).

Q. They submitted a bill for it? A. Yes.

Q. You paid it? A. Yes.

Q. I mean——(interrupted)

A. The company paid it.

Q. ——the Universal Plan Service paid it?

A. No, the Hippodrome Amusement Company.

Q. I mean, the Hippodrome Amusement Com-pany paid the Universal Plan Service, yes.

A. That's right.

* * * * *

Q. I am going to hand you an Exhibit which we will assume is already marked—it has a pen-cilled 35 on it, and will be marked as Exhibit 35, and ask you if this is a print from the tracings of the [168] preliminary sketch?

A. (After examining Exhibit) Yes, it is.

Q. That you have been mentioning for the im-provement of the Seaside property of the Hippo-drome? A. Yes.

Q. Mr. Royce, I notice that on this plan, it says, "Building for E. Royce, Seaside, Oregon," was this E. Royce or the Hippodrome?

A. Hippodrome Amusement Company.

(Testimony of Ezra Royce.)

Q. You called up the architect and asked him to prepare them? A. Yes, I did.

Q. And was the architect Mr. H. B. Bolen and Don Byers? A. Yes, Universal Plan Service.

Mr. Jones: I should like this marked, please, as Exhibit 35.

The Clerk: Petitioner's Exhibit 35 for identification.

(Petitioner's Exhibit 35, witness E. Royce, marked for identification.)

The Court: Are you offering that?

Mr. Jones: I shall, yes. I offer it in evidence.

Mr. Picco: May I ask a few questions, your Honor, in connection with this?

Mr. Jones: Mark this Exhibit 36, would you please?

The Clerk: Petitioner's Exhibit 36 for identification.

(Petitioner's Exhibit 36, witness E. Royce, marked for identification.) [169]

The Court: Proceed.

Mr. Picco: When was this plan finished—what year?

The Witness: I—it seems to me it was either the latter part of '53 or the early part of '54.

Mr. Picco: It was in '53 and '54 then, when this came out. It says March 17, 1954, does that give you some idea of when it was?

The Witness: That probably was the date of it when it was perfected.

Mr. Picco: When it was drafted.

(Testimony of Ezra Royce.)

The Witness: And these negotiations had been going on, I would say, for, oh, almost a year.

Mr. Picco: Now, it pertains to what property here, I mean——(interrupted)

The Witness: Well, here's—this is—this block over here, which only shows a little piece of it, that belongs all to the Hippodrome, that entire block, and this piece here—this front here, a little piece here like that, does not belong to Hippodrome, and the rest of this block, which you can see is a very long block—runs clear over to the Necanicum River—that belongs to the Hippodrome and that was the location for the building.

Mr. Picco: And the fact that your name is all over this thing, you were just agent for somebody in that?

The Witness: No, I was not. I don't know why they put my name on it, but that's what they did.

Mr. Picco: I have no objection to that, your Honor, going into evidence.

The Court: It will be received.

(Petitioner's Exhibit 35, witness E. Royce, received in evidence.)

Q. (By Mr. Jones): I am not handing you the Petitioner's Exhibit Number 36 for identification, and ask you to state each of the papers—what each of the papers are that compose this Exhibit?

A. The first one is a check made to the Universal Plan Service, for sixty dollars, from the Hippodrome Amusement Company; and the second is

(Testimony of Ezra Royce.)

the invoice of the Universal Plan Service, for the plan that they made for the Hippodrome Amusement Company, for the Post Office Department.

Q. Now, this check was paid—this invoice here on Exhibit 36, is made to E. Royce?

A. Yes.

Q. The check, however, is signed by—appears to be on the bank account of Hippodrome Amusement Company?

A. Yes.

Q. Is that correct?

A. That is correct.

Q. Is it in payment for the plans which are Exhibit 35?

A. Yes.

Q. Was the plan ordered and paid for as an obligation of Hippodrome Amusement Company?

A. It was.

Q. Now, are you at the present time negotiating for anything for the improvement of that—or for the improvement of that property that's leased?

A. Yes.

Q. With whom?

A. Greyhound.

Q. Greyhound is what?

A. Greyhound—Pacific Greyhound is the largest motor stage operator on the west coast.

Q. And does it have need for some improved property, such as you are thinking of in Seaside?

A. It has need for a better location than they have at present.

Q. And that is what your negotiations are about?

A. Right.

Q. By the way, I didn't ask you this question, and perhaps I should. The Hippodrome Amuse-

(Testimony of Ezra Royce.)

ment Company is an Oregon corporation, isn't it?

A. Yes, it is.

Q. It is in good standing now—in other words, it is in existence? A. Yes.

Q. It hasn't dissolved, or expired?

A. It's a going concern, yes.

Q. Now, then——(interrupted) [172]

A. It owns all this property down there.

Q. Does it have a monthly rental income?

A. Yes.

Q. Does it have any—has it had any need for the twenty thousand dollars that you borrowed since the time you borrowed it? A. No, it has not.

Q. Do you expect it will have need for it?

A. Yes.

Q. When?

A. Well, if this negotiation develops, it will need it very shortly.

Q. If these plans here on 36 Exhibit—35 Exhibit had gone through, would there be any need for that twenty thousand dollars?

A. Yes, there would.

Q. Supposing that the Oregon Motor Stages had have gone ahead and completed, would there have been need for the money?

A. Yes, there would.

Q. When there is need for the money, what do you intend to do about it? A. Pay it.

Q. Is it a loan? A. Yes.

Q. Has it at all times been your intention to repay it? A. Yes; yes.

(Testimony of Ezra Royce.)

Q. What—now, when it was taken, was it taken with that [173] understanding? A. Yes, it was.

Q. Has there ever, in the meantime, been any different understanding or intention on your part of the other stock—of the other Directors' province? A. No.

Q. When was the Oregon Motor Stage negotiation for the improvement underway?

A. That was about in either '48 or '49.

Q. Now, I want to ask you a little question that is out of order at this time, but I promise to connect it up through Mr. Niederkrome. This—there is a note receivable standing against you on the company's books, for the amount of this loan. The note has not been presented to you for payment, is that right? A. That's correct.

Q. If it is, and when it is, what will you do?

A. Pay it.

Q. I mean, for execution—if and—if it is and when it is, what will you do?

A. If the note is presented?

Q. If the note is given to you to sign for that, what will you do? A. Sign it.

Q. Why hasn't it been signed between the time the account of note receivable was opened in '54 to the present time? [174]

A. Well, we didn't want to change the status of it during the—pending of this dispute.

Mr. Jones: You may cross-examine.

(Testimony of Ezra Royce.)

Recross Examination

Q. (By Mr. Picco): What steps were taken, if any, to remodel the building in 1945, when this loan—this so-called loan was made to you?

A. The question isn't quite clear to me, please.

Q. What steps were being taken by the corporation to remodel the building in December of 1945, at the time you took twenty thousand dollars out of the corporation?

A. I don't—I don't recall any steps in remodeling the building at that time. We did do some remodeling, but it isn't quite clear to me what year that was done in.

Q. No plans were taken to remodel actually—specific plans until 1953—the plans you just brought in—into the trial now?

A. Well, with the Post Office Department was the closest deal we have had to build a building—not remodel.

Q. These plans had to do with—to build a new building?

A. A new building, yes.

Q. Now——(interrupted)

A. There was some remodeling done on the old building—the dance hall building, at an earlier date. I don't recall the year.

Q. Now, the fact that the Commissioner's agent had started the tax investigation some time in '49 and '50 was or wasn't a factor in [175] getting out these plans?

A. Never thought of it.

Q. Now, this was an accounts receivable—it was

(Testimony of Ezra Royce.)

set up as an account receivable on the books, was it not? A. Yes.

Q. No payment was made on it during all this time? A. No.

Q. No payment has yet been made?

A. No.

Q. There has been no interest charged or paid by you? A. No, but the interest will be paid.

Q. You have the controlling stock interest in this Hippodrome?

A. I believe I do. I think I have a little more than fifty per cent.

Q. You regard the corporation—as your corporation, do you not? A. No, I do not.

Q. Don't those plans that we have—Petitioner's Exhibit 35, indicate that you regard that as E. Royce—the Hippodrome remodeling?

A. No; absolutely not. The only reason for that is, this architect knows me very well, and I called him up and told him what I wanted, and why he put my name on it, I don't know, but he did.

Q. In 1945, the corporation——(interrupted)

A. But he has done work for the Hippodrome Amusement Company [176] before, so he knows better.

Q. You say that in 1945, the corporation was thinking in terms of remodeling or expanding, or putting on a new building?

Mr. Jones: What year did you say?

Q. 1945?

A. Well, it has been our plan, in our mind, for

(Testimony of Ezra Royce.)

some considerable time, if we could find a suitable tenant, we wanted to construct a building on this vacant property.

Q. Now, wouldn't that indicate that there was a need for that twenty thousand dollars in the corporation, rather than in your hands?

A. No, the corporation had no need for the money at that time, and hasn't had since. But if any one of those—either one of those propositions had developed, they would have needed it.

Q. Now, you also stated that you had some arrangements or negotiations going on with Oregon Motor Stages? A. Yes.

Q. That was in 1945 and '46?

A. No, I think that was about in '48 or '49.

Q. Now, Oregon Motor Stages is a corporation that is owned by you and the Petitioners—the other Petitioners in these proceedings?

A. Let's see—yes, about—there were about five—five ownerships in the property.

Q. You mentioned that Oregon Motor Stages decided—Oregon Motor Stages wouldn't be interested because revenues were dropping off, is that correct? [177]

A. They seemed to feel that way, yes.

Q. That was in '47 and '48?

A. No, '48 and '49.

Q. Now, isn't it true that Oregon Motor Stages, in 1948, bought land at Seaside?

A. The Oregon Motor Stages had a couple of—they bought about two vacant lots for turn-around

(Testimony of Ezra Royce.)

purposes at—where they—presently have depots for some time.

Q. What was the purpose of that? Weren't they thinking in terms of getting a place where people could board the—board your buses?

A. Well, the reason they bought those lots was, they didn't have adequate facilities for turning around and so on and so forth.

Q. Isn't that exactly what the Hippodrome Company could have done for them, provided that for them? A. Oh, yes.

Q. Isn't it true, therefore, that Oregon Motor Stages had no intentions of doing that? They intended to buy land of their own down there, and do that very same thing you say was the reason for taking the money out?

A. No; no; no, that is not correct. The present location of their depot is way over by the old railroad depot. It is out of the center of the town, and it's a poor location.

Q. Now——(interrupted)

A. But they didn't have facilities for handling big equipment [178] without the purchase of those two vacant lots. I believe it was two vacant lots.

Q. Now, actually, you say it's two vacant lots. Now, they actually paid sixty-five thousand dollars for the two vacant lots, did they not?

A. They sure did not.

Q. Didn't they purchase the Burke (phonetic) Motor Sales building in November, 1949—I am talking about Oregon Motor Stages?

(Testimony of Ezra Royce.)

A. Oh, no. In Seaside, they—I think they paid about three hundred dollars apiece for those two lots that they bought.

Q. Now, to get back to the question. Did the Oregon Motor Stages pay sixty-five thousand dollars for a building in 1949 at Seaside?

A. They did not.

Q. Were they authorized to buy a building for sixty-five thousand dollars in 1949?

A. At Seaside?

Q. That's correct. A. No, sir.

Q. Did we have—do we have the corporate minutes of the Oregon Motor Stages here? Hippodrome is at Astoria, isn't it?

Mr. Jones: No, Seaside.

Q. Well, this was at Seaside, too, wasn't it?

A. I beg your pardon. You have confused the purchase of that building that was in Astoria. [179]

Q. As distinguished from Seaside?

A. From Seaside, yes.

Q. All right.

A. But the vacant lot was in Seaside.

Q. Now, was there a Directors' meeting of the Hippodrome Company held in connection with the building plan that we have here, Petitioner's Exhibit 35? A. Yes, I think so.

Q. Do we have the minutes of the Hippodrome Company here?

Mr. Jones: No.

Mr. Picco: Are you going to have them here?

Mr. Jones: If you have to have them.

(Testimony of Ezra Royce.)

Q. You had a Directors' meeting on that—was it reduced to the minutes of the corporation?

A. On the Post Office?

Q. No, about—about this plan that you had in 1953?

A. That's the Post Office plan.

Q. All right, if that is what it is, yes.

A. Yes. I don't know whether there was a—whether it got to that point, because we didn't—we didn't have a go ahead from the Post Office Department, however, the Post Office Department, the Inspector, Mr. Northrup (phonetic), told me, "Don't be concerned about it," he says, "we're going through with this deal." But it didn't go through, and they—however, they are building a post office, but it wasn't put on that piece of ground. [180]

Q. Now, when was the account receivable changed to a note receivable?

A. I don't—Mr. Niederkrome could tell you that better. I am not quite as familiar with it as he is.

Q. Some time in '53, wasn't it?

A. I wouldn't be sure. He would know.

Q. Now, you stated that you didn't want the change of status of that account, is that correct?

A. That I didn't want to change it?

Q. Yes, and that's why the note wasn't issued to you for execution?

A. I said that due to this dispute we had with the Government, that we didn't want to change it.

Q. Actually, you did change it on the books of the corporation?

(Testimony of Ezra Royce.)

A. Well, Mr.—I didn't change it. Mr. Niederkrome takes care of the books, and he would be able to explain that to you better. I am not too familiar with it. [181]

* * * * *

EZRA ROYCE

the previous witness called on behalf of the Petitioners assumed the stand following the previous two witnesses out of order, and continued as follows:

Re-redirect Examination

Q. (By Mr. Jones): Mr. Royce, when were you married to Mrs. Royce? A. 1923.

Q. How long have you been in the taxicab business in Portland? [196]

A. Forty-five years.

Q. Prior to the time that there was the present partnership, was there a corporation?

A. Yes, there was.

Q. And did Mrs. Royce perform any services for the taxicab company during the time there was the corporation and prior to the partnership?

A. Yes, she did.

Q. What was the nature of her services?

A. Well, she done a lot of checking on drivers, the quality of service, number of passengers in various places; how they handled the public, at the depots, hotels, stands, and so on and so forth.

Q. And where did you perform your services?

A. I was busy at the office, shops, garage, and so on.

(Testimony of Ezra Royce.)

Q. Now, was that corporation subsequently dissolved? A. Yes, it was.

Q. Prior to its dissolution, was any stock given to Mrs. Royce? A. Yes.

Q. I would like to hand you the Exhibit Number 23—I am handing you here, Exhibit Number 23, and asking you to state what that is?

A. That is a stock certificate for fourteen thousand shares, Yellow Cab, Incorporated, an Oregon corporation, Portland, Oregon, to Dora F. Royce.

Q. Now, after this stock was given to her, and she was the owner [197] of it, was the corporation liquidated? A. Yes, it was.

Q. And a partnership formed? A. Yes.

Q. Who were the partners?

A. Mr. and Mrs. B. Royce, Dora F. Royce and myself, Mr. Charles Keffer (phonetic) and Mr. C. H. Luton (phonetic).

Q. Had those—I want to just call attention to the admitted Exhibit, your Honor, that Exhibit Number 24 is the meeting—minutes of the meeting of dissolution of the corporation, and there is no use to go into those. And Exhibit Number 25, I am going to hand to you and ask you to state what that is?

A. Partnership Agreement, Articles of Partnership.

Q. That's signed by whom?

A. E. Royce, B. Royce, C. H. Luton, Charles W. Keffer, Dora F. Royce, Isabelle H. Royce.

Q. Thank you. Now, when you gave—when you

(Testimony of Ezra Royce.)

gave the stock certificate to Mrs. Royce, what was your intention with respect to the gift?

A. I intended that she become a partner in the company.

Q. Well, was the gift—was the gift—have any conditions to it, of any kind?

A. None whatever.

Q. Was it—was she obligated to become a partner in the company, when you gave it to her? [198]

A. Yes.

Q. Did you really—what was your actual intention, so far as the duration of the gift was concerned?

A. There was no duration.

Q. What? A. There was no duration.

Q. Well, do you mean by that it was short time, or long time, or permanent, or what?

A. Permanent.

Q. Permanent. Now, then, since she was made a partner to the company—to the—made a partner in the Yellow Cab Company, the partnership, in Portland—now, my questions, until I announce otherwise are directed entirely to the Portland partnership. I will go to the Seattle later. And what services, if any, has she performed for the partnership?

A. You say has she performed?

Q. Does she—what does she—what has she performed?

A. As I stated previously, she does a lot of checking of the drivers, at the stands, the hotels, appearance of uniforms, condition of uniforms,

(Testimony of Ezra Royce.)

and the appearance of the cabs; cleanliness; the number of passengers they carry—reports those to the office.

Q. How much time does she devote to an occupation of that kind?

A. Oh, at times, she devotes considerable. Other times, not quite so much. [199]

The Court: Is this in the present time or—
(interrupted)

The Witness: She still does it. She still does that. Has for years.

Q. Now, the years in question here are '44 to '47—during that period of time, '44 to '47—during that period of time, how much time there was she devoting to this?

A. Well, I would say a great deal. Some—some days she would put in a good many hours, and of course, some days, not so much, it depends on—(interrupted)

Q. How important is this type of work to a taxicab company? A. Very important.

Q. How about just getting a paid employee to do it?

A. Generally speaking, it doesn't work so well.

Q. And why is that, Mr. Royce?

A. Well, they are not interested too much. It doesn't mean anything to them, particularly.

Q. Now, did Mrs. Royce receive drawings of the partners from this partnership?

A. Yes, she did.

(Testimony of Ezra Royce.)

Q. Do you know whether she had a bank account of her own? A. Yes, she did.

Q. Do you know any of the things she spent her drawings for? A. Yes, I do.

Q. Would you recite some of them? [200]

A. Well, she bought herself fur coats and she wanted the basement of our house completed; it was a partial basement—she wanted to make a full basement, and install a downstairs kitchen; walk-in cooler; large freezer; storerooms; luggage room; washroom, and so on and that is one of the things that she—and enlarged the kitchen upstairs.

Q. Did she do that with her own funds?

A. Yes, she did.

Q. Can you name any other concrete articles that she purchased?

A. Yes, she has always been quite a hand for buying books—she bought a lot of books—good many hundred dollars' worth. She—another item, there was an Exercycle she bought.

Q. What would that cost?

A. About three hundred and some dollars, I guess—three hundred and fifty—three hundred and twenty-five.

Q. Now, do you know whether she ever bought any automobiles? A. Yes.

Q. What did she buy?

A. She had a—a Pontiac.

Q. During this period, '44 to '47?

A. Oh, during that period? Excuse me.

Q. Yes.

(Testimony of Ezra Royce.)

A. She had a Plymouth, I believe about '44, and then she had two New Yorkers. [201]

Q. Those Chryslers?

A. Yes, New Yorkers—Chryslers.

Q. Were those purchased new? A. Yes.

Q. What were the cost of those?

A. Oh, I think around about—probably close to four thousand dollars, I don't know the exact price.

Q. What were the cost of these—this fur coat?

A. She had a couple of fur coats.

Q. Well, what were the cost?

A. Just as a guess, about a thousand dollars apiece, say.

Q. Did she ever buy any furniture for the house?

A. Yes, she did. Quite a considerable.

Q. What was that?

A. Oh, various things—rugs and odd pieces.

Q. Any dishes or table linen?

A. Table linen, yes, quite a considerable.

Q. Well, what about that? Do you know about it, specifically?

A. Well, I know one tablecloth she bought.

Q. What kind?

A. I think it is a hand-painted cloth.

Q. Do you know what the price was?

A. Well, not exactly, but it was considerable.

Q. All right, what about—did she buy any silverware? A. Yes. [202]

Q. How much did she pay for it, do you know?

(Testimony of Ezra Royce.)

A. I think probably it ran about eighteen hundred dollars, is my guess.

Q. Did she buy any bonds or stocks?

A. Yes.

Q. What?

A. She bought quite a good many Government bonds, and she bought some stock, some bonds.

Q. In what company?

A. I recall the Missouri-Pacific Railroad, one.

Q. Was that bonds or stock?

A. I believe it was both.

Q. What is the cost of this improvement work that you have been elaborating on about the house? What did that amount to?

A. It ran somewhere between fifteen and eighteen thousand dollars.

Q. Was that—all these expenditures out of her drawings? A. Yes.

Q. Who made the sketches for this improvement on the house? A. She did.

Q. Who——(interrupted)

A. In fact, she made the sketches for the entire house.

Q. Who took care of the ordinary household expenditures, like food, light, heat, groceries, and things of that kind? [203] A. I did.

Q. She didn't buy any of that?

A. Oh, a little, I suppose; not very much.

Q. You took care of it? A. Yes.

Q. That was your department?

(Testimony of Ezra Royce.)

A. Generally speaking, that was—heat, light, taxes, insurance.

Q. Now, when you formed this partnership, what was the intention of the other partners and yourself, particularly with respect to Mrs. Royce being a valid and bona fide partner?

A. Our intentions were that she was a full partner.

Q. Is she? A. Yes. I——(interrupted)

Q. Do you know what her interest in the partnership is? A. About twenty-three per cent.

Q. Do the other partners recognize her as a full partner? A. Yes, they do.

Q. As a working partner? A. Yes.

Q. Mr. Royce, now, there was—I would like to go to the Seattle partnership, if I may. There was a pre-existing Washington corporation known as the Yellow Cab, Incorporated, a Washington corporation, is that correct?

A. There was a corporation, if that's just the exact name, I am not positive. [204]

Q. Well, I will show you some shares of stock here—I am handing you Petitioner's Exhibit Number 14—I think that's 14—14—that has been received in evidence. But I would like to ask—have you state what it is?

A. It is a certificate of the Yellow Cab Company of Seattle, for three hundred shares of stock, made out to E. Royce.

Q. Now, would you look at the next certificate?

A. That is a certificate for seven hundred shares

(Testimony of Ezra Royce.)

of stock, made out to E. Royce, trustee for E. M. Royce, a minor.

Q. Now, take a look at the next one, please?

A. That is a certificate for four hundred and two and a half shares of stock, of the Yellow Cab Company of Seattle, made out to D. F. Royce.

Q. Well, now, Mr. Royce, when you—first, who is D. F. Royce? A. Mrs. E. Royce.

Q. That's Dora F. Royce.

A. Dora F. Royce.

Q. And she is one of the Petitioners involved in these suits? A. Yes.

Q. And she is the party that we referred to as your wife, in talking about the Portland——(interrupted) A. That is correct, yes.

Q. ——partnership. Now, who is E. M. Royce, mentioned in Certificate Twenty-three, on Exhibit 14? [205]

A. That is my daughter.

Q. How old is your daughter at this time?

A. Twenty-six.

Q. When did she become of age?

A. In 1950.

Q. And this—these certificates are dated in '44—she was about fourteen or fifteen at the time these were made, or how old?

A. Fifteen, I believe.

Q. Fifteen. Now, at the time, or about the time these certificates were made, did you execute a declaration of trust for her? A. Yes, I did.

Q. I'd like to show you, Exhibit Number 15,

(Testimony of Ezra Royce.)

and ask you if that is the Exhibit of trust to which you have referred—or the declaration of trust to which you have referred?

A. (After examining Exhibit) Yes, it is.

Q. That is in irrevocable trust by its terms, is it?

A. That's correct.

Mr. Jones: Just, if the Court please, I would like to read one paragraph of this, I think we can carry the thread of it a little better. (Reading) "I, Ezra Royce—" —or, "That I, Ezra Royce, of Portland, Oregon, do hereby declare that I am the sole and absolute owner of the following described personal property in my own right, but do declare that I hold the same, henceforth, from the date hereof, in trust, in the form of a trust, herein [206] declared and created for the benefit of my beloved daughter, Eunice M. Royce, and others hereinafter named, seven hundred shares of the capital stock of Yellow Cab Company of Seattle, represented by Certificate Number Twenty-three." Now, the thing shows, and I won't take the time to read further, that there may be conversions of other types of property.

Q. (Continuing by Mr. Jones) Now, after these shares of stock had been issued, was there a partnership created? A. Yes, there was.

Q. Now, when you gave these shares of stock, did you give them outright, or was there any conditions to them?

A. No conditions, no; an outright gift.

(Testimony of Ezra Royce.)

Q. They were in perpetuity—in other words, they were their shares? A. Absolutely.

Q. Now, a partnership then was created. How many partners were there in that? I will give you—I will hand you the Articles of Copartnership—I believe you have those over here—16? I would like that, please. May I have the gift tax return? I will take this bunch right here. Thank you. Here is the declaration of trust. The Articles of Copartnership is what I want. Thank you. When you made this gift of this stock, the gift was one gift to your wife, Dora F. Royce, or D. F. Royce, and one to your daughter, is that correct? A. That is correct.

Q. And then you filed gift tax returns? [207]

A. That's correct.

Q. And these are the gift tax returns, both of the donor and the donees, covering the gifts?

A. Yes; that's right.

Q. And—(interrupted)

Mr. Picco: Mr. Jones, what Exhibit is that?

Mr. Jones: This is Exhibit Number 16.

Q. (By Mr. Jones): Sixteen was what I had referred to as the gift tax returns? A. Yes.

Q. Thank you. Now, after this gift was made, was the partnership formed?

A. Yes, there was, a partnership.

Q. And the old corporation liquidated, is that correct? A. That's correct.

Q. And did the stockholders in the old corporation, after liquidation, become partners in the new partnership? A. Yes, they did.

(Testimony of Ezra Royce.)

Q. And I am handing you now, Exhibit Number 18, and asking you to state who the partners of the new partnership were? At the time—find out who they are now?

A. They were B. Royce, E. Royce, E. Royce, trustee for E. M. Royce, a minor, D. F. Royce, A. H. Wenck, W. L. Rothchild, J. A. Baldy (phonetic), G. E. Worster (phonetic), D. N. Newton (phonetic), L. S. Ackerman (phonetic). [208]

Q. Are any of those men—have any of those men died since? A. J. A. Baldy.

Q. He has since passed away? A. Yes.

Q. Now, then, do you know what the intention of those partners was at the time this partnership was organized, with respect to whether your wife, Dora F. Royce, and the trust, yourself, as trustee for your daughter, what their intention was with respect to whether those two entities were to be bona fide partners? A. Yes, they were.

Q. Has that still been the intention?

A. Yes. Still is.

Q. Tell me how that partnership up in Seattle operates—who is the Manager?

A. Mr. A. H. Wenck, has been the Manager at all times, since it was organized.

Q. And did this—do you find it necessary to go up there very much?

A. Not very much, no.

Q. And does your wife ever go up there?

A. Oh, occasionally, she goes with me.

Q. And what does—when you go up there, and

(Testimony of Ezra Royce.)

when she goes up there, what is the—what do you do with respect to the partnership?

A. Oh, we look around, to see how things are going. [209]

Q. But Mr. Wenck is the active Manager, is that right?

A. Mr. Wenck is the active Manager, and a very good man.

Q. Now, when she's there, in addition—do you have conferences? A. Oh, yes.

Q. Does she take part in those?

A. Yes, she does.

Q. When you are not—when she is not in those conferences, does she do any other work up there with respect to—— (interrupted)

A. Yes, she looks around, to see how things are—various prominent points.

Q. Does she report those findings?

A. Oh, yes. Like hotels, depots.

Q. Now, do you maintain a bank account, as a trustee, for the trust for Eunice?

A. Yes, I do. [210]

* * * * *

Q. (By Mr. Jones): I am handing you now, Petitioner's Exhibit 37 for identification, and ask you to state what that is, Mr. Royce?

A. That is a passbook of the United States National Bank, in the account of E. Royce, trustee, for E. M. Royce.

Q. Now, does Eunice, and also, does your wife, Mrs. D. F. Royce, receive drawings from the part-

(Testimony of Ezra Royce.)

nership in Seattle? A. Yes, they do.

Q. Now, when you get them on behalf of Eunice, do you—what do you do with them?

A. Deposit it in the United States National Bank.

Q. In the account represented by this passbook, Exhibit 37? A. That's right. [211]

Q. Has every drawing ever received from that partnership up there, since it was created, that was made out to Eunice, been put in this bank account?

A. Yes, it has.

Q. So this records every—every deposit?

A. That's correct.

Q. And every withdrawal?

A. That's right.

Mr. Jones: We offer it in evidence. That's 37.

Mr. Picco: Did you develop how much money is in there?

Mr. Jones: I have got an accountant that will put on the—put on the sheet that tabulates that in the disbursements.

Mr. Picco: No objection.

The Court: Exhibit 37 is in evidence.

(Petitioner's Exhibit 37, witness E. Royce, received in evidence.)

Q. (By Mr. Jones): Now, I am handing you Exhibit Number 38 for identification, and ask you what that is—what those are—what makes up the Exhibit?

A. Those are the checks that have drawn against the account of E. M. Royce, of which I am trustee.

(Testimony of Ezra Royce.)

Q. During the years here involved?

A. Yes.

Q. Now, there are a few missing checks in here that have been— [212] you have not been able to find, I understand, is that correct?

A. That is correct.

Q. Now, those can be ascertained from the stub book what they are?

A. Yes; oh, yes.

Q. And on the statement that the accountant will put in, will all the missing numbers be accounted for?

A. Yes, they will.

Mr. Picco: If I understand you correct, these are the checks made out by yourself as trustee, coming out of that bank account?

The Witness: Yes, that's correct.

Mr. Picco: And for various expenditures?

The Witness: Yes.

Mr. Picco: No objection, your Honor.

The Court: Exhibit 38 in evidence.

(Petitioner's Exhibit 38, witness E. Royce, received in evidence.)

Q. (By Mr. Jones): Now, Mr. Royce, at the— at times, have you as an individual, borrowed money from this trust?

A. Yes, I have.

Q. And when you have borrowed it, what have you done to show your borrowing it?

A. Made out some notes.

Q. And as those notes became due and weren't paid, what did you [213] do?

A. Renewed them.

* * * * *

(Testimony of Ezra Royce.)

Q. (By Mr. Jones): Now, have some of the borrowings that you have made, been repaid? I am talking about the borrowings during [214] this particular period now—have some of those been repaid? A. Yes, they have.

Q. And are these copies of the notes you gave for the borrowings that you made from the trust?

A. Yes, that's right.

Mr. Jones: I would like to offer them in evidence.

Mr. Picco: I would like to ask a few questions first. Now, are these all of the notes you have on this?

The Witness: During these years?

Mr. Picco: Well, for all of the time that you were trustee, during the years '44 to '47?

The Witness: Yes.

Mr. Picco: This represents the amount of money during those years that you took out in the form of notes?

The Witness: I think it goes past '47, doesn't it?

Mr. Jones: It goes to '49, doesn't it? Let's see, isn't the year '49 involved in this?

Mr. Picco: Oh, yes, on Eunice's—'49—'44 to '49.

The Witness: I think it covers '49, yes.

Mr. Picco: Now, these are dated July 7th, 1952; December 26, '53, and July 10, 1951.

The Witness: Yes.

Mr. Picco: So what does that mean?

The Witness: That means they were renewed.

(Testimony of Ezra Royce.)

Mr. Picco: You have the renewal notes — the other notes? [215]

The Witness: I am not sure. I think so.

Mr. Picco: Could you bring these—the old notes over, so that we can look at them—— (interrupted)

The Witness: I think so.

Mr. Picco: ——this afternoon?

The Witness: I think I have them.

Mr. Picco: Now, this constitutes all of the amount that you borrowed from the trust?

The Witness: That's right.

Mr. Jones: For that period.

Mr. Picco: For that period?

The Witness: That's correct.

Mr. Picco: You are sure that there wasn't some hundred and fifty thousand dollars that was borrowed during that period from the trust, rather than two thousand, twenty-five thousand and sixty thousand?

The Witness: Yes, I'm sure.

Mr. Picco: No objection to that going in, your Honor.

The Court: Exhibit 39 in evidence.

(Petitioner's Exhibit 39, witness E. Royce, received in evidence.)

Q. (By Mr. Jones): Now, during this period, were some sums taken from this account, and deposited to Eunice's own bank account? A. Yes.

Q. Now, Eunice lived at home until she was about eighteen, [216] going to high school, is that right? A. Yes, that's correct.

(Testimony of Ezra Royce.)

Q. And then, where was she from 1918 to 1951?

A. Well—— (interrupted)

Q. Well, I don't think I should—yes, for one year, it's important.

A. Well, I believe you have that date wrong. You said 1918. That's too early.

Q. Yes, from the time she was eighteen, I meant to say—from the time she was eighteen until 1951?

A. She was at the—going to school at Oregon University.

Q. At the University of Oregon? A. Yes.

Q. Now, one of those years—one of those years would be 1949, wouldn't it? A. Yes.

Q. In other words, was she in school in 1949?

A. Yes.

Q. So, some of the checks that were in here went into the bank account that she used during that period? A. That's right.

Q. And where is that bank account located?

A. That's at the Sixth and Morrison Branch of the First National Bank.

Q. I would like to call your attention specifically to—here is [217] a check for two hundred dollars to Eunice, and here is another one for three hundred dollars to Eunice, and there are—here is another one for three hundred dollars to Eunice—they are checks in those denominations—are those the checks that you took from the trust account and put into her own bank account that she has?

A. That's correct.

Q. Mr. Royce, I would like to ask you one ques-

(Testimony of Ezra Royce.)

tion a little bit—on another issue here—did you and the partners in Portland also hold conferences about the partnership? A. In Portland?

Q. In Portland, about the Portland partnership? A. Yes.

Mr. Picco: This is in respect to the Portland—— (interrupted)

Mr. Jones: This is in respect to the Portland—I'm sorry—I am a little out of place here, but I overlooked that.

Q. Did you and the other partners hold conferences about that? A. Yes, we did.

Q. Did your wife attend those conferences?

A. Yes, she did.

Q. Did she take part? A. Yes.

Q. And does she keep herself informed about the conditions of the Portland business?

A. Pretty well. [218]

Q. And about the Seattle business?

A. Yes, she does.

Q. Now, then, we have shown that you put in gift tax returns for the gifts that you made in—in Seattle. Did you make a gift tax return for the ones that you made here in Portland?

A. No, I did not.

Q. Why?

A. I didn't know that there was such a thing.

Q. Who made your tax returns in those days?

A. I did.

Q. And the gift at that time was fourteen thou-

(Testimony of Ezra Royce.)

sand shares, and those were one dollar shares, were they not? A. Yes, they were.

Q. Now, then, in both of the partnerships, your assumed name certificates, both at Seattle and Portland were filed, weren't they? A. Yes.

Q. One in King County, in the Clerk's office, and the other one in the County Clerk of Multnomah County office? A. That's right.

Q. Your wife—they are in evidence. I just want—— (interrupted) A. Oh, yes.

Q. ——to make reference to it. Your wife signed at both places? A. Yes.

Q. Now, when this partnership was formed in Seattle, was she [219] present at the meeting where the formation was made? A. Yes, she was.

Q. That's true in Portland also? A. Yes.

Q. In connection with the liquidation of the partnership up in Seattle, all of the stockholders tendered their stock for cancellation for the liquidation of the Seattle partnership, is that right?

A. Yes, they did.

Q. I would like to refer you to Exhibit Number 17—I think it's over here, and ask you if that—this is a photostat of that tender? Here is the original tender. This is the original tender of that stock signed by all of the stockholders, is that correct?

A. That is correct.

Q. And the figures in the column on the right show the number of shares that each of them held at the time, in the corporation, just before liquidation?

A. Yes.

(Testimony of Ezra Royce.)

Q. Thank you. Now, that stock was all, actually, turned in and cancelled? A. Yes, it was.

Q. And the same was true in Portland, that all the stock was turned in and cancelled here?

A. Yes.

Q. That is the pre-existing taxicab company was cancelled before the Portland taxicab company was organized? [220] A. Yes.

Q. Now, in these policy meetings that you have in Portland and Seattle, how is the opinion and judgment of Mrs. Royce received in them?

A. Very well.

Q. Does she take part in the discussions?

A. Oh, yes.

Q. And in the partnership up there, both you, as trustee for Eunice, or Eunice, however you want to put it— (interrupted) A. Yes.

Q. —and your wife, have they at all times been treated as bona fide partners?

A. Oh, yes.

Q. And so regarded? A. Yes, indeed.

Q. And that is the intention of all the partners—parties up there? A. Yes.

Q. Now, I would like you to tell me something—I would like to have you tell me something about the business experience of Mrs. Royce prior to her marriage to you?

A. Mrs. Royce started out learning the milliner's trade, and worked her apprenticeship, I believe, in Salem; then went to Lewiston, Idaho, and Toppenish, Washington, Tacoma, Washington; Se-

(Testimony of Ezra Royce.)

attle, Washington, where she was a designer and in charge of the operation [221] for McDougal and Southwick (phonetic), the department store. Then, after she came to Portland, she was for some time with Meier and Frank Company. In designing.

Q. She had had considerable business experience—— (interrupted) A. Oh, yes.

Q. ——before you married her? A. Yes.

Q. Now, in this expense account that Eunice had, was she free to draw out of that as she needed funds? A. Yes.

The Court: Did she, in fact, draw out of it?

A. You mean herself? Sign her own checks?

The Court: Yes.

A. No. She always asked me for whatever she needed. I took care of it.

Mr. Jones: If the Court please, did you mean on her own account, or on this trust account?

The Court: The trust account.

Q. On the trust account, you always signed the checks? A. Yes.

Q. On her account, she alone signed the checks without consulting anyone.

A. Yes, had nothing to do with the trust account.

Q. Except that the money for it—a great deal of it came from [222] the trust account?

A. That is correct.

Q. Now, what is the main producing—income-producing factor in a taxicab business?

A. Well, first, you must have capital.

(Testimony of Ezra Royce.)

Q. Well, is that the important income-producing factor? A. Sure is.

Q. Now, when did Eunice first learn of her own trust?

A. I think it was about when she was eighteen years old.

Q. And where did you tell her?

A. At home.

Q. And in what room?

A. In the kitchen.

Q. And who was present?

A. Mrs. Royce and myself.

Q. Why didn't you tell her before she was eighteen?

A. Well, I thought she was too young to understand. What it was all about.

Q. Since that time, she has known all about its operation? A. Oh, yes.

Q. Did you ever have a joint checking account with your wife? A. No, I did not. [223]

* * * * *

Re-Recross Examination

Q. (By Mr. Picco): I am going to ask questions in regard to the Portland Yellow Cab—— (interrupted) A. Yes.

Q. ——partnership — Yellow Cab, Portland, right now. Now, you made a gift of the stock to your wife and daughter—or to your wife, Dora, August 1, 1942? A. That's right.

Q. Now, at the same time, Yellow Cab, Inc., was

(Testimony of Ezra Royce.)

dissolved, and a partnership by the same name was formed?

A. I didn't quite understand that question?

Q. At the same time, August 1, 1942, the corporation, Yellow Cab, Inc., was dissolved, and the partnership of the same name was [224] formed?

A. I know it was quite close. I didn't know that it was the same day. I thought that it was a little later.

Q. Now, you—all right—you testified on direct examination, that when you turned over the stock to your wife, Dora Royce, you intended her to become a partner in the company?

A. That's right.

Q. And you stated that she was morally obligated to become a partner? A. Yes.

Q. You wouldn't have given her the stock, if she hadn't felt that way about it—if she hadn't felt that she was obligated to become a partner?

A. Well, she—she was—being as she was of so much help to me, and so on, that I felt morally obligated to do it.

Q. That was the purpose of giving—making the gift of stock? A. To make her a partner.

Q. That's right. A. That's right.

Q. Now, as to her activity as a partner. You mentioned that she performed many services. Now, these services were minor in character, were they not?

A. I don't think so. To a taxicab operation, those

(Testimony of Ezra Royce.)

things are vitally important. It's all we have to sell is service.

Q. Service is very important, I take it, in the operation of the [225] Yellow Cab Company here in Portland? A. It's all we have to sell.

Q. Now, would you tell us just the time she used in giving services again—go over a little of the nature of the services?

A. She—she would check the driver's appearance, and the service they render, at the hotels, depots, places of that kind, where they are easily available to check. Check the number of passengers in the cabs to see that the drivers report the number properly—conditions of the uniforms, conditions of the cabs, appearance for cleanliness, and so on and so forth.

Q. You didn't do any of that yourself, did you?

A. Oh, yes, at times, whenever I have an opportunity, yes.

Q. You made the decisions—— (interrupted)

A. It is a never ending job. I beg your pardon?

Q. You made the decisions—the important decisions on the operation of the cab company?

A. You say I did?

Q. Yes. A. Well, I suppose.

Q. What were your duties, as distinguished from Dora Royce's duties?

A. Well, I was looking after the things at the office, and around the garages, and so on and so forth; building, shop, shop crew, garage crew, and things of that nature.

(Testimony of Ezra Royce.)

Q. You were making the everyday decisions that had to be made? [226]

A. Yes.

Q. Now, you say that Dora Royce rendered these services during all of these years, 1944 to '44—to 49? A. Yes; still does.

Q. Can you tell me—can you estimate the per cent of the time that she spent in rendering services to the partnership?

A. Per cent of her time?

Q. Yes, was it a great deal of time?

A. Yes, quite a bit.

Q. Would you go into that a little more? Was she down there everyday?

A. No, not everyday, but lots of days she would be there—put in a lot of time, and sometimes in the evening, also.

Q. You say she devoted fifty per cent of her time to the partnership? Or less?

A. That would be a little hard to estimate, as I say, some days she put in a considerable time, and then, some days, she didn't put in much, if she had some other matter that she had to take care of.

Q. In any event, she put in considerable time and energy—(interrupted) A. Yes.

Q. —in addition to services?

A. That's right. That's my opinion.

Q. I hand you Respondent's Exhibit B, which is the partnership return of Yellow Cab Company, Portland, for the year 1946, and [227] direct your attention to Schedule I. That Schedule I has to

(Testimony of Ezra Royce.)

do with partner's share of the income and credit, and there is a paragraph 2 devoted—yes—per cent of time devoted to the business. Will you please read what per cent of time was devoted to the business by Dora F. Royce?

A. The bookkeeper put down "none." But he didn't know too much about it. Whoever typed that just typed that in there, and I don't know.

The Court: I can't hear you.

A. I said whoever typed this out didn't know anything about it. They just typed in "none."

Q. Now, this is your signature——(interrupted)

A. And they put me down for fifty per cent. That's certainly not correct, either.

Q. Is that your signature?

A. That's right.

Q. You certified that the return was correct on that, did you not?

A. Yes. I didn't—that sort of a thing, I never give any consideration to.

Q. Now, I hand you Respondent's Exhibit W, which is the partnership return of the same company, for 1948, and ask you again, on page 4, to look at Schedule I, and see if the same thing hasn't been reported there?

A. That is the same thing. [228]

Mr. Jones: What year is this?

Mr. Picco: 1948.

Mr. Jones: Well, I object to '48. It's not even in evidence. That is a year that isn't even involved here.

(Testimony of Ezra Royce.)

Mr. Picco: Well, it is, '44 through '49.

Mr. Jones: Not in Portland. '47.

Q. (By Mr. Picco): It won't be necessary for that. You did state, did you not, that she is still continuing those services after the years in question? A. Yes, still does.

Q. And would you say that this return for 1948 is wrong also, in that respect?

A. Yes, I would.

Q. Now, I hand you Respondent's Exhibit—(interrupted)

A. For some reason, he raised it up to seventy-five per cent for me also. I don't know why.

Q. Perhaps you worked a little harder that year on that, would that be the answer?

A. In his opinion, apparently (laughter).

Q. Now, I hand you Respondent's Exhibit X, which is the partnership return for the year 1949, and direct your attention to page 4, Schedule I, and ask you if her percentage of the time reported was again none? A. That's right.

Q. And you signed that return also, did you not? [229] A. I did.

Q. Now, as to her distribution—her distributable share of the earnings—was it all withdrawn—all of the money—her distributable share of the money in the partnership, was it all withdrawn from the partnership?

A. I can't answer that exactly. But whatever—whenever there was a distribution, why, her share was withdrawn, whatever that distribution was.

(Testimony of Ezra Royce.)

Q. Will you roughly tell us what—how much of the distributive share was for the year '44—1944 to 1947?

A. Just offhand, I couldn't. You would have to refer to the records.

Q. Now, you testified that as to some items, she used that money for herself—the expended money?

A. That's right.

Q. They were comparatively small amounts of money, were they not?

A. Well, no, I wouldn't say so.

Q. In comparison to the amount of money that she received from the partnership, it was?

A. Well, yes, that would be true, but of course, the biggest item was taxes—that was the big item, of course. But it came out of the money that was distributed to her.

Q. One of the big items was the payment of the taxes?

A. That was the big item—biggest item. [230]

Q. Now, you say that a lot—you say that some of the money went into bonds and stock?

A. Yes.

Q. How was that made—how were the bonds and stock made payable to—to your joint account—jointly, you and Dora?

A. We have never had a joint account.

Q. These stocks that were purchased, did they write them in her name or in both of your names?

A. The bonds—bonds, I don't think had any

(Testimony of Ezra Royce.)

name on them. They're not—they don't have names, I believe.

Q. You mentioned one stock, Pacific, I think you said? A. The Missouri-Pacific.

Q. How much money did she invest in that?

A. Oh, I have forgotten the exact amount. Several—I think she had a considerable amount of Missouri-Pacific stock, of the old issue.

Q. Did she invest in that at your advice and suggestion? A. I think so.

Q. You were interested in that stock, weren't you?

A. I bought some of it, too. Considerable, in fact.

Q. Now, did she invest any more money in any of these stocks that you know of?

A. It seemed to me that she had some Northwestern bonds at one time, too.

Q. You don't know the amount, or how much?

A. No, I don't, and she had some Missouri-Pacific bonds and quite a lot of Government bonds.

Q. And you don't know whether that you took title jointly, or in your name? A. No.

Q. Don't know any of it?

A. No, we did not.

Q. Now, that meant—that means a considerable amount of money that hasn't been accounted for, now, did you borrow that money from her?

A. No, she invested that money in the Aldergold Copper Company, a considerable amount of it, along with myself.

(Testimony of Ezra Royce.)

Q. Now, you were the—— (interrupted)

A. On a loan basis.

Q. On a loan basis?

A. That was on a loan basis, yes.

Q. To you?

A. No, to Aldergold Copper Company.

Q. Now, the Aldergold Company—the gold mine and copper mine, that you had the primary stock interest in it?

A. You mean—I don't quite understand.

Q. You were promoting that corporation, were you not?

A. I owned about five per cent of the stock in it. Is that—— (interrupted)

Q. The common stock? [232] A. Yes.

Q. Didn't you have much more stock than that in that? A. No.

Q. You—didn't you have over a million shares in it? Stock? A. Oh, no, indeed I did not.

Q. Do you have the books of that company here?

A. No, I do not. Mr. Magne (phonetic) is the Secretary of the company. No, I never had a million shares.

Q. Would you please explain just how this was loaned to the company—this money that belonged to Dora was loaned to the Copper Company—the Aldergold Copper Company?

A. Well, I don't—it isn't quite clear to me. A loan is just made as a loan, and a note taken for it.

Q. She had a little interest in that corporation?

(Testimony of Ezra Royce.)

A. She had a little stock in it.

Q. You were primarily the one that was interested in it?

A. Well, yes. I had about five per cent in it. She had some stock in it, not a great lot. But she was very much enthused in the company, and she thought it had great future and possibilities.

Q. Now, again on that, she made this loan to the Aldergold Company at your advice and suggestion?

A. Not altogether. She—she made many trips up there with me, and was very enthusiastic about it.

Q. How much money did she loan this company?

A. Oh, probably in the neighborhood of seventy-five thousand, or thereabouts.

Q. Now, actually, this company was in developing stage at that time?

A. Yes, you might say that. It was in operation though.

Q. It didn't start operating, did it, until 1950?

A. It might be—'49, I am inclined to think.

Q. In other words, the—— (interrupted)

A. But the whole—the thing was being built and organized and so on and so forth.

Q. And you were the main promoter and organizer of that company?

A. Well, I don't know as I could be the main promoter and organizer—Mr. Stone, Mr. Magne and Mr. Schneider (all phonetic) were very active in it too.

Q. However, during that period of time—the

(Testimony of Ezra Royce.)

years in question, 1944 and 1947, it was definitely in a development period, and you—it was a—it was just a prospecting proposition?

A. No, it wasn't a prospecting proposition. It was a mine that had considerable tonnage of ore developed.

Q. Now, when was that tonnage developed?

A. Well, it was developed quite a good many years before that. Not by our group. Our group wasn't the one that done that work. That had been done some time before. Maybe a good deal of that development, I think, took place about thirty years before.

Q. Now, tell us just what was done in the way of development [234] on that, and what status the development was in in this period, 1944 to 1947?

A. Well, you mean the status of the property on the development basis? Well, it had about, I would say, probably—oh, three or four thousand feet of tunnel work in it, and probably had two hundred and fifty thousand tons of ore developed. Some hijackers got into it then and took a lot of it out.

Q. Now, that note, you said you took a note on that?

A. Uh huh.

Q. For seventy thousand dollars?

A. I stated it was somewhere in that neighborhood.

Q. Do you have the note here?

A. No, I do not.

(Testimony of Ezra Royce.)

Q. Now, isn't it a fact that that note was made out to you—payable to you?

A. There's quite a sheaf of notes and just off-hand, I couldn't tell you.

Q. You were selling preferred stock in 1947, weren't you, in that company? A. Yes.

Q. And for every share of preferred stock, you were getting two and a half shares of common stock?

A. Giving two and a half shares, yes, that's right.

Q. You had over a hundred thousand shares of the common, did you not? [235]

A. You say did I have?

Q. Yes. A. Personally, myself?

Q. That is correct.

A. Yes, I have—I have over a hundred thousand shares. I think it is about five per cent, I believe.

Q. Now, isn't it a fact that the common stock account of that company, Aldergold Copper Company, shows you having over a million shares of common stock?

A. No, that's a trust. That million shares is a trust that was deposited with the old National Bank in Spokane. That stock does not belong to me. [236]

* * * * *

Continued Re-recross Examination

Q. (By Mr. Picco): We were discussing the Yellow Cab partnership of Portland. A. Yes.

Q. We were discussing the Aldergold Mine Com-

(Testimony of Ezra Royce.)

pany? You testified that seventy thousand dollars of the money distributed to Dora Royce was invested in that mine, is that right? A. Yes.

Q. And that actually was money that was used by you in the promotion and sale of the stock in that company? A. No.

Q. And you said there was a note that was made payable to whom?

A. I didn't know—I have stated that I didn't know exactly what that situation was, that I would have to look it up over the weekend.

Q. And you are going to bring that in Monday?

A. I will see what the situation is, and have the answer for you Monday. [237]

Q. Now, that accounts for the principal amount of Dora's—Dora Royce's distributive share of the partnership earnings, does it not? A. Yes.

Q. And outside of payment for taxes and for the small amounts that she made on the basement in the home, the improvements around the house, it went primarily into this gold mine?

A. I think about seventy thousand dollars, I believe, yes. Of course, the repairs in the home that she put in there was considerable.

Q. Is it fair to state the money was invested primarily in your own personal ventures?

A. Well, I don't know—you couldn't hardly term Aldergold Copper Company primarily my venture. I may have about five per cent interest in it.

Q. You—you promoted and sold thousands and

(Testimony of Ezra Royce.)

thousands of shares of common stock in that gold mine?

A. Well, I didn't sell all that that was in there, you know. There were many people that was doing that besides myself.

Q. But you were engaged in the sale of that stock?

Mr. Jones: If the Court please, on this particular issue, I don't have any objection for Mr. Picco to examining him on it insofar as it might show an inconsistency with any testimony he gave on direct examination. But this is a settled issue—this Alder-gold Mine is a long, drawn-out settled issue—at least, I thought it was settled, and it is not being tried in this lawsuit, and I should [238] feel that any examination on this issue ought to be confined only to conflicting statements.

Mr. Picco: If your Honor please, I do not want to raise any of the settled issues. I am just pursuing the statement he made that seventy thousand dollars of that went into this gold mine, and I am trying to show that he was primarily interested in the sale and promotion of that gold mine stock.

The Court: I suppose your theory back of that is—— (interrupted)

Mr. Picco: He practically had the use of that money—— (interrupted)

The Court: ——that his wife invested in his ventures, and in that way, subject to his dominion. I suppose that is your theory?

Mr. Picco: That is correct, your Honor.

(Testimony of Ezra Royce.)

The Court: You may proceed.

Q. (By Mr. Picco): So it is a fair statement to make that you actually had use of this money?

A. Well, I don't hardly agree with that, as there being an investment in the Aldergold Copper Company, it is in the form of—would be in the form of a mortgage, which isn't a—seems to me, a part of the mining company's affair.

Q. I have one or two more questions on that, and I will leave it. You did have a contract, dated January 11, 1947, with Mr. Magne and Mr. Stone of Spokane, for the purpose of financing the development [239] of that project. You were to finance the development of that project?

A. To a certain extent.

Q. You did do that, though, did you not?

A. Yes, I did.

Q. Now, I am referring my questions to the Seattle partnership, with reference to Dora Royce. Now, the gift of stock that you made to Dora Royce was April 20, 1944, in connection with this partnership—in connection with this company?

A. Seattle?

Q. That's correct?

A. I think it was in January '44.

Q. Well, anyway, the certificates will show the date on that, Mr. Royce. The corporation was dissolved and the partnership was formed around May 1, 1944?

A. I believe so.

Q. Now, the formation of the partnership was

(Testimony of Ezra Royce.)

conceived at, or prior to the time of the making of the gift of stock, was it not?

A. No, I don't think so.

Q. It was all one transaction, you—— (interrupted)

A. No, I think the gift of stock was made in January.

Q. Did—did you have the same intention of donating this stock as you did in the stock of the Portland cab company?

A. To make her a partner?

Q. Right. A. Yes. [240]

Q. And you considered her morally obligated to enter that—to become a partner and to enter the partnership agreement? A. She did.

Q. You did consider that, at the time of giving the gift—that was the understanding between you and Dora Royce?

A. No, not particularly. When I gave her the stock, I just gave her the stock. Now, if she decided that she didn't care to stay in the company, she was under no obligation to do so.

Q. Now, is this a change in your story from what you said this morning?

A. I don't think so.

Q. Now, as far as the distribution of the earnings of the Seattle partnership, what happened there—what was the explanation—how was it distributed to Dora Royce?

A. Just, I turned in my original certificate, and had new certificates made.

(Testimony of Ezra Royce.)

Q. Yes, I appreciate that, but the distribution of the partnership earnings—did Dora Royce get those?

A. Oh, yes.

Q. In what form?

A. In proportion to her ownership.

Q. Were checks made out, or did she get it in currency?

A. Oh, no, she got it in checks.

Q. Just as everybody else did?

A. Just the same as everybody else did. [241]

Q. Now, do you have those checks here?

A. No, I don't have them.

Q. I have a—you were required to bring checks, anything along that line, to indicate just how that distribution took place, in the subpoena duces tecum, weren't you?

A. Well, they may be here, but I don't have them.

Q. Don't you have checks that were made out to Dora Royce in 1945?

A. From the Seattle company?

Q. Yes.

A. Oh, I think that the company, of course, would have them back again, but I believe they are here someplace, I am not sure.

The Court: At the time of these distributions, did you make proportionate distributions to all the—— (interrupted)

A. Yes, in accordance with their percentage of ownership.

The Court: Periodically?

A. Yes. Well, I couldn't say exactly at any defi-

(Testimony of Ezra Royce.)

nite time. They were made whenever the funds were available—where the company didn't need them.

Q. The set of the checks that were received by Dora Royce, weren't they endorsed in blank to you?

A. Endorsed in blank to me? No.

Q. Did you borrow any of that money from Dora Royce?

A. I don't recall having done so.

Q. Do you know how the money was invested—or what she did with the money? [242]

A. Well, for some time there, she kept quite a bit of it on hand, I believe. She used her own judgment as to what she'd done with it. It was not under any of my control.

Q. You don't know anything about it?

A. Well, I know she had money on hand. I don't know—I didn't pry into her affairs to see exactly how much and so on and so forth.

Q. You didn't borrow any of the money from her to invest in your enterprises?

A. I don't recall having done so.

Mr. Jones: Mr. Picco, you are speaking about which monies now?

Mr. Picco: The monies she received from Seattle Cab.

Q. You made the statement this morning that your wife Dora Royce often went up to Seattle with you, in connection with the business of the partnership, isn't that right?

A. Well, I—oftentimes when I went up, why, she would go along with me, yes.

(Testimony of Ezra Royce.)

Q. Did she use the expression that she would sometimes go up alone and check on things up there?

A. No, I don't hardly think so. I don't recall her having gone alone. She may have once or twice, but I don't recall it.

Q. Now, I am going to ask you questions referring to the partnership interest of Eunice Royce. May I have Petitioner's Exhibit 16, 14 and 18 and 15? [243]

The Clerk: What was the other one—14?

Mr. Picco: Fourteen.

The Clerk: Sixteen?

Mr. Picco: Sixteen and fifteen next.

The Court: Mr. Royce, you have spoken about investments that your wife made in your home, furnishings and so forth—home furnishings and construction, did you participate in those at the same time?

The Witness: Did I furnish the money?

The Court: Contribute part of the money?

The Witness: No. Anything that she wanted, she just went ahead and done it herself. She consulted me about it, that she would like to do it, and then just went ahead.

The Court: You didn't contribute like amounts?

The Witness: No.

Q. (By Mr. Picco): Incidentally, in connection with the partnership in Seattle, do you know who performed the checking duties which Dora did in Portland—Dora Royce did in Portland?

(Testimony of Ezra Royce.)

A. They have had, over the years, quite a good many people doing that sort of thing. A man by the name of Weaver (phonetic) I am particularly familiar with, that has been doing that work for years.

Q. He was an ordinary employee of the company?

A. Yes, he's not an ordinary employee, I wouldn't say, but he's an excellent top-flight man.

Mr. Jones: I can't quite hear you, Mr. Royce.

A. I say I wouldn't consider Mr. Weaver an ordinary employee. He's an excellent, top-flight man—would be hard for us to replace.

Q. I hand you Exhibit Number 16, which represents the gift tax return for yourself and the donee return for Eunice Royce. A. Yes.

Q. I want you to look at the donee return. That is signed by Ezra Royce, trustee for Eunice Royce, is that right? A. Yes, that's correct.

Q. Now, did you regard Eunice as a partner in this firm, or how did you do it?

A. Yes, I consider her a partner, yes.

Q. You considered Eunice a partner?

A. Yes.

Q. And you were acting in a—agency capacity for her?

A. Well, I would think so, yes. She was a minor at that time.

Q. I hand you Exhibit Number 15, which is a declaration of trust—this is a copy—no. I hand you Exhibit No. 18, which is the partnership agreement,

(Testimony of Ezra Royce.)

and ask you to look at the last page, where the signature is on, and how did you sign that, for Eunice?

A. E. M. Royce—Eunice Mae (phonetic) Royce by E. Royce, trustee.

Q. So that when it says E. M. Royce, it has reference to Eunice M. Royce? [245] A. Yes.

Q. Again, you were signing there as if Eunice was the partner, is that correct? A. Yes. [246]

* * * * *

Q. (By Mr. Picco): What was your interest in Yellow Cab, Seattle, prior to the gift of stock to Eunice and to Dora Royce?

A. Percentagewise?

Q. No, the number of shares?

A. I don't recall the exact number of shares.

Q. Was it fourteen hundred and two shares and a half? I think it has been stipulated in one of the exhibits that that was the number?

A. I believe that is probably about right.

Q. Now, you—you made a gift of seven hundred shares to Eunice, and four hundred and two and a half to Dora Royce? A. Yes.

Q. Who owned the controlling interest in the partnership in Seattle?

A. There wasn't any—any one person that owned the controlling interest.

Q. You and B. Royce, and the respective members of the family, owned fifty or more per cent of the stock—of the interest of the partnership, did they not?

(Testimony of Ezra Royce.)

A. I think my brother and I owned fifty-one per cent at some time. [247]

Q. Do you know whether any trust returns were filed, during the years in question?

A. Tax returns?

Q. Trust tax returns, yes?

A. I don't know. I am not familiar enough with the tax returns to know a trust tax return when I see it, I don't believe. I think all the returns have been filed, but I—— (unfinished answer)

Q. I hand you Respondent's Exhibit ZZ, which is the income tax return—the partnership income tax return, the amended one, for 1948—I'm sorry, the individual income tax return for 1947, amended, by Eunice Mae Royce, and I ask you to look at the signature there, and you signed that how?

A. Eunice Mae Royce, by E. Royce, trustee.

Q. Yes. Now, that's the same on all of these, Respondent's Exhibit YY, for the year 1947, is that correct?

A. That was signed E. Royce, trustee.

Q. That was signed "E. Royce, trustee."

A. Her name doesn't appear on that, for some reason.

Q. I give you Respondent's Exhibit double-X, which is the amended return for 1946 for Eunice Royce, and how did you sign that?

A. E. Royce, trustee, for Eunice Mae Royce.

Q. Now, these were all on—all on ten forty returns, were they? There weren't any trust returns filed there, is that correct?

(Testimony of Ezra Royce.)

A. I don't know what you consider—I am not too familiar—— (interrupted) [248]

Q. This is on the regular individual return?

A. Seemed to be all the same, yes.

Q. Now, I want to show you Respondent's Exhibit double-V, for 1945, for the return of Eunice M. Royce. Now, is there any signature there, at the bottom of that one? A. No, there isn't.

Q. It hasn't been signed, has it? Can you explain that to the Court, just what happened in that instance?

A. I certainly cannot. I can't understand that.

Q. Now, I want to find out just what you did with the money that was distributed from the partnership to Eunice Royce. Now, you received that as trustee, did you not? A. Yes.

Q. Was it—did it come in by way of checks?

A. Yes.

Q. And it was payable to you, or to Eunice, trustee, by—just tell us how it was done?

A. Well, I—just exactly how the check was made out, I don't know, but it came—it came along in proportion to her ownership, the same as to all the rest of the partners, and I deposited the check in the United States National Bank.

Q. Now, every time you received a check, payable to you, trustee, or to Eunice, by you, trustee, you put that in this passbook which is Exhibit 37?

A. Yes. The United States National Bank. [249]

Mr. Picco: May I have Petitioner's Exhibit 37, and also 38, 39, 40 and 41?

(Testimony of Ezra Royce.)

The Clerk: Forty and 41 haven't been in yet. Which one did you—— (interrupted)

Mr. Jones: Thirty-nine—I spoke of 40 and 41, but I stopped at 39.

The Clerk: You put them in as one exhibit? That is 39.

Q. (By Mr. Picco): This is Exhibit 37, and is this the bank book that you are referring to?

A. Yes.

Q. Now, you say all the money went into that bank—into that bank account? A. Yes, sir.

Q. That was distributed from the partnership?

A. Yes.

Q. And are these—this is Exhibit 38—there seems to be some checks? A. Yes.

Q. Are those checks that are going out of the bank account? A. Yes.

Q. And to the people that are shown payable therein? A. Yes, that's right.

Q. Does that constitute all of the checks that were in the bank account, or is there still some in the bank account, for the years in question? [250]

A. No, there's—there are a few—there are a few checks that are missing in these here. But Mr. Niederkrome made the record and he has those all in the record.

Q. I want you to go—— (interrupted)

A. I don't know where they have gone to here.

Q. I want you to go over each one of these checks and tell who the payee is, and tell us just what sort of an investment that was?

(Testimony of Ezra Royce.)

A. That was for—— (interrupted)

Q. Now, that's number one—the number one check, of Petitioner's 38?

A. That is a Government bond.

Q. That was payable to Yellow Cab Company?

A. Yes. That was for a Government bond. E bond.

Q. What happened to the bond?

A. I think she still has it.

Q. Was that for her? A. Yes.

Q. Why was it paid to Yellow Cab Company?

A. Well, the Yellow Cab Company had a permit to handle United States Government bonds, and still has it.

Q. Let's take the next one.

A. So that is the reason we could buy them—— (interrupted)

The Court: I can't hear you when you turn your head the other way. [251]

A. We could buy the bonds directly at the Yellow Cab Company because it had some kind of a permit from the Government—I believe it's the Post Office Department, to sell bonds to its employees. Some kind of an arrangement—I don't know just exactly how it works.

Q. We will just put this at the bottom, and take the next one. Check number two.

A. That is J. W. Maloney (phonetic), Collector of Internal Revenue.

Q. That is two thousand dollars?

A. Two thousand dollars.

(Testimony of Ezra Royce.)

Q. That was for payment of the tax?

A. Yes. And J. W. Maloney—— (interrupted)

Q. That's check number three. I'll call out the check number in each one of them.

A. All right. Eleven hundred and sixteen dollars and sixty-five cents.

Q. Number four?

A. Oh, I see. That again, is for another bond— hundred dollar bond. And J. W. Maloney—— (interrupted)

Q. That's number five.

A. ——Collector, two thousand dollars. Check number five. Check number six is missing. Check number seven is J. W. Maloney, seven dollars and five cents. Check number eight is J. W. Maloney, [252] Collector, two thousand dollars.

Q. That will be enough for a while now.

A. There is another one for—— (interrupted)

Q. They were all about the same, small amounts to Yellow Cab Company, is that right?

A. That was for bonds also.

Q. A hundred and thirty-one dollars?

A. Yes, a hundred and thirty-one dollars, and—I think that is for seven—— (interrupted)

Q. Tell us something about check number ten, dated December 29, 1945?

A. That was a loan to me.

Q. In what amount?

A. Twenty-five thousand dollars.

Q. Can you tell us anything further about it? Have you ever paid it back? A. Not yet.

(Testimony of Ezra Royce.)

Q. That was in 1945? A. Yes.

Q. Did you have—did you give her a note or anything for that? A. Yes.

Q. Did you ever pay any interest on it?

A. Not yet, no.

Q. Do you have the note? [253]

[No answer.]

Q. Do you have the note here?

A. Yes. I believe the note's in here.

Q. It's not in evidence, no. Check number eleven, dated January 14, 1946, is for twelve thousand three hundred and sixty dollars, that's— (interrupted)

A. J. W. Maloney, twelve thousand three hundred and sixty dollars.

Q. Payment of taxes, that is?

A. That is correct. Check number twelve, J. W. Maloney, Collector, seven thousand five hundred and forty-two dollars and six cents.

Q. Just a second, on these two, they are dated—are these the payment of taxes for Eunice Royce?

A. Yes; yes.

Q. They're not being used for yours?

A. Absolutely not. Number thirteen is a check for J. W. Maloney for four thousand dollars.

Q. Let me go along. We want to cut the time a little on this. That is also the payment of taxes?

A. Yes.

Q. And the next check is payment of taxes, in four thousand dollars? And here is one July 10, 1945 — '46 — check number fifteen — tell us about that?

(Testimony of Ezra Royce.)

A. That is a check for two thousand dollars, made to me.

Q. Is that a loan to you—to yourself? [254]

A. Yes.

Q. Trustee to yourself? A. Yes.

Q. Now, did you give a note on that or was it an account?

A. No, I did—I gave a note on that.

Q. And that hasn't been paid?

A. I think that has been paid, but I would have to dig up the records, and that may take a little time to do it, so—— (interrupted)

Q. When was it paid?

A. I think it was paid shortly after this. I wouldn't be sure about it. I would have to—— (interrupted)

Q. Are you sure it wasn't paid after the investigation—— (interrupted) A. No, no.

Q. ——by the agents? A. No.

Q. Check number sixteen is for payment of taxes, four thousand dollars?

A. Four thousand dollars.

Q. Ten thousand dollars, check seventeen, payment of taxes? A. Right.

Q. Nineteen, payment of taxes? A. Yes.

Q. Four thousand dollars?

A. Right. [255]

Q. Now, here is a check you may explain?

A. Check number twenty-two, Eunice M. Royce, two hundred dollars, December 1st, 1947.

Q. Is that the one you were talking about this

(Testimony of Ezra Royce.)

morning? About the two hundred dollars that was given to Eunice? A. I don't recall that.

Q. Now, this small amount here of two hundred dollars, was that for personal expenditures?

A. Yes.

Q. At school, or someplace?

A. Well, for just whatever she wanted it for.

Q. Check twenty-three, of six thousand dollars to the Collector of Internal Revenue?

A. That's right.

Q. That's for her taxes? A. Yes.

Q. Here's check twenty-four, to Eunice M. Royce, for three hundred dollars?

A. Three hundred dollars.

Q. That's for personal expenditure?

A. Yes. Shall I go on with another one?

Q. I will see if I can't shortcut this. Most of these checks are payable to the Tax Collector for taxes? A. That's right.

Q. A few in small amounts payable to Eunice, and two or three [256] larger amounts payable to yourself, is that correct?

A. There's quite a few of them payable to Eunice.

Q. What is this? A. That was a loan.

Q. Will you describe—this is check thirty-four, dated November 23, 1948, and you—— (interrupted) A. Royce, Incorporated.

Q. You made it payable to Royce, Incorporated?

A. Yes.

Q. For one thousand dollars?

(Testimony of Ezra Royce.)

A. That's right.

Q. What did that represent?

A. That was a corporation which—that owned some property here in Portland, and I made a loan, and these totals here, I think amount to seven thousand one hundred dollars—— (interrupted)

Q. You were loaning from the trust again here, is that correct?

A. And they paid interest on it, and she got the—— (unfinished answer)

Q. You were paying this—you were paying this to yourself, weren't you? A. No; no; no.

Q. Will you ex—— (interrupted)

A. Royce, Incorporated is a corporation that owns the Columbia Athletic Club building.

Q. Well, why was this payment made to Royce, Incorporated? [257]

A. Well, she had funds, and so I just took it from her account and loaned it, and they paid interest on it.

Q. In other words, you borrowed it?

A. Not me, no. The corporation borrowed it.

Q. Here's another one, check thirty-seven, dated February 3rd, 1949?

A. That was part of the same—— (interrupted)

Q. That was made payable to Royce, Inc.?

A. Royce, Inc., same thing. And then there is another one in there somewhere for five thousand dollars on the same thing. It amounted to seventy-one hundred dollars.

(Testimony of Ezra Royce.)

Q. Now, she is loaning to this corporation, is that what she was doing here? A. Yes.

Q. And will you tell us something about the corporation, Royce, Inc.?

A. It owns the Columbia Athletic Club building, on 11th and Alder.

Q. Now, you own the controlling stock interest in that?

A. Well, no, I own half interest in it, and two other fellows own the other half.

Q. You were interested in seeing that some loan was made to the corporation?

A. Well, I could have just as well made it myself, as far as that goes, but I thought it would be probably better from her standpoint [258] that she make it.

Q. You were thinking in terms of a good investment for her or just—— (interrupted)

A. Yes.

Q. ——because you were short of funds?

A. No, no. No, it was a good investment. The interest was paid, the loan was paid.

Q. Has the loan been paid? A. Oh, yes.

Q. That takes care of all of these checks, which is Exhibit 38. Now, was there any—any balance left in the bank account, after using up those checks?

A. Yes.

Q. Very much?

A. Yes, sizeable sum. Mr. Niederkrome has the—— (unfinished answer)

Q. What sort of investments did you make out-

(Testimony of Ezra Royce.)

side of this—payment of taxes and payments to yourself in the form of a loan—what other investment did you make for this trust—for Eunice?

A. Oh, I don't recall just at the minute.

Q. As a matter of fact, you didn't make any other investments except that, did you?

A. Yes, I think there has been some investments, yes.

Q. But generally, they are of the type of order that we have just given—you have just referred to now, in your testimony? [259] A. Loans?

Q. Loans, yes? A. Yes.

Q. Now, I hand you Petitioner's Exhibit 39, and ask you again to tell us what that is?

A. Those are—that is a copy of a note that I gave to Eunice's account.

Q. Let's take that one up first. Now, that note is dated July 7th, 1952? A. Yes.

Q. Now, that refers to sixty thousand dollars?

A. That's right.

Q. Now, when did you borrow that money?

A. Some time in either '45 or '46.

Q. And that's not the—that's the—you classify that as a renewal note, is that correct?

A. This is, yes.

Q. And do you have the cancelled note?

A. Yes, I said this morning I thought I did have.

Q. Will you bring that?

A. Yes, I will. I will do that.

(Testimony of Ezra Royce.)

Q. Now, was any interest paid at all on the old note? A. There were some payments there.

Q. These payments were made in 1954, is that correct? A. That's correct. [260]

Q. Now, is that payment of principal, or payment of interest? A. Payment of principal.

Q. Just the first note, please?

A. Payment of principal, I think. I believe that the interest is accrued, it will be paid.

Mr. Jones: A little louder.

A. I say the interest has—is accrued and will be paid.

Q. As far as this—this is—we are now referring to the note dated July 7, 1952, that is correct, isn't it? A. Yes.

Q. Now, let's go to the note dated December 26, 1953, and tell us about that. That is a note for twenty-five thousand dollars? A. Yes.

Q. And again, it's signed by you, and it's payable to the order of Eunice M. Royce?

A. That's right.

Q. Now, it's not payable to the trust at all there, is it?

A. Well, that's what is meant by it.

Q. In fact, the one before is the same one—is the same way? A. Yes.

Q. Now, you didn't sign that as—yes, you did, too. Now, that's twenty-five thousand dollars. When was that borrowed?

A. I think that's a renewal note too.

Q. You borrowed that back in 1945, '46?

(Testimony of Ezra Royce.)

A. The exact date, I don't know. Mr. Niederkrome would have [261] that information.

Q. That's when you think it was?

A. Yes.

Q. Now, did you pay any interest on that note—on the old note—the cancelled note?

A. No, there hasn't been. That is accrued also.

Q. I would like to know why you cancelled the other notes?

A. Well, I didn't want them to outlaw.

Q. Is that the reason why?

A. Yes, that's the reason.

Q. But no interest was paid on any of those notes, is that correct?

A. No. I think though, this one was paid.

Q. Now, you're—you're not referring to the note for twenty-five thousand dollars? A. No, no.

Q. Now, we will take up the note dated July 10, 1951. That is in the amount of two thousand dollars? A. Yes.

Q. Now, that was borrowed back in the tax years too, was it not?

A. I think it was probably in '46—maybe possibly '47, but I think it was '46. He would have that date.

Q. The old note is available around here on that? A. Not here, I don't think. [262]

Q. Did you cancel that too, for the same reason, that you were afraid that it would be outlawed?

A. Yes, I think so. But I think that one is paid. I will have to dig into it.

(Testimony of Ezra Royce.)

Q. Now, are you sure that that was paid?

Mr. Jones: The Court isn't hearing a thing you're saying.

A. Oh, pardon me.

The Court: It's rather important that I hear it.

A. Yes, that's right. I'm sorry. You see—part of that is paid there, about half of it.

The Court: Don't turn your face away. Please keep your face turned this way.

Q. Is this payment of interest or payment of principal?

A. I took it as a payment of principal.

Q. Now, this payment of about nine hundred dollars there—almost—— (interrupted)

A. Ten hundred and fifteen dollars.

Q. That was paid in 1953 and 1954?

A. Yes.

Q. And nothing was paid on the cancelled note?

A. No.

Q. In connection with that. Now, did that account for all of the money that went into the Eunice Mae trust?

A. Yes, it does.

Q. So that outside of payment for taxes, and a few amounts for [263] personal living expenses of Eunice, it went into your own notes?

A. Besides what's left.

Q. That is the principal amount went into your own notes?

A. Taxes and my own notes.

Q. All told, how much do you owe the trust—owe Eunice Mae Royce?

(Testimony of Ezra Royce.)

Mr. Jones: If the Court please, I would like that answer and question restricted to 1949.

Q. Yes, at that period of time?

A. At the end of 1949—eighty-seven thousand dollars.

Q. What kind of interest were you promising to pay? A. Three percent.

Mr. Picco: I have no other questions on these matters, your Honor.

The Court: Do you have any further questions?

Re-re-redirect Examination

Q. (By Mr. Jones): I would like to ask a few questions here. On this Aldergold Company number of shares that you have, Mr. Royce, in your own name, in your own right, how many, do you recall?

A. It's about five percent, or I think about a hundred thirty-four thousand. The exact number I am not—— (interrupted)

Q. I have a figure of a hundred and thirty-four one forty-eight, does that figure sound familiar to you? A. That sounds right. [264]

Mr. Picco: What was that answer?

Mr. Jones: What?

Mr. Picco: What was the answer?

Mr. Jones: A hundred and thirty-four thousand, one forty-eight.

Q. Mr. Royce, were there ever trouble on the drivers not—of the taxicabs not always turning in the full amount of the fares or the correct number of passengers? A. Oh, yes; yes.

(Testimony of Ezra Royce.)

Q. Is that one of the reasons—— (interrupted)

A. Very often.

Q. Is that the reason you have to have a very confidential person checking?

A. That is correct.

Q. One of the reasons?

A. Yes; very important.

Q. Now, you—do you have other interests besides the Yellow Taxicab Company that demand a portion of your time?

A. Yes, I do.

Q. And what proportion of your time would you say that you devote, during the periods here involved—or the particular period involved in Portland, 1944 through 1947, how much time would you figure that you personally devoted to the affairs of the taxicab company?

A. Well, there were times when I couldn't devote very much; and other times, I had more. [265]

Q. Well, can you strike any fair average percentage?

A. Oh, probably, was in the office half the time—in that neighborhood, I guess.

Q. Well, now, when you—you spoke this morning about the garage, shop and office?

A. That's right.

Q. Well, what does the half time embrace?

A. I mean it would cover those three places, the garage, and the shop and the office.

Q. And the other half of the time was at other affairs?

A. Yes.

Q. Now, when you were in the office, was your

(Testimony of Ezra Royce.)

time exclusively devoted to the taxicab company business? A. No, it was not.

Q. What would you use it for?

A. Oh, various other things that I would have to take care of.

Q. People about your other interests would come in and talk to you? A. Yes, a good deal.

Q. Letters to write about them? A. Yes.

Q. Now, Mr. Royce, I want to call your attention to this gift tax return—16, I believe it is. I wish you would take a look at that and see if that in any way refreshes your memory on the time—of the time when the stock was actually given?

A. (After examining Exhibit) It's dated March the 15th.

Q. Well, that's 1945 when you filed it, isn't it?

A. Yes, that's right.

Q. Well, is there anything on there—on the face of the return in the—— (interrupted)

A. Oh, yes, January 1945—'44—January, 1944, that's right, on both of them; that's right.

Q. Now, then, having—do you have an independent recollection of the time of the gift, aside from this gift tax return?

A. Well, my recollection was that it was just shortly after the first of the year—just a few days.

Q. Now, the fact that the stock certificate may have not been dated until April—can you explain that?

A. Just at the moment, I can't, no. I don't know how that came about.

(Testimony of Ezra Royce.)

Q. May I see the stock certificate—that is Exhibit number 14? (Exhibit handed.) The stock certificates appear to be signed by Mr. Wenck and yourself as President, and Mr. Wenck the Secretary, and they appear to be written in a hand different than either of yours, do you know anything about looking at that, and the data, that would recall to you any reason why the certificates are dated subsequent to the gift tax returns?

A. (After examining Exhibit) No, it doesn't recall to my mind anything; not just at the moment.

Q. Is it your best recollection that the gift of the stock was [267] actually made in January?

A. Yes; that's right.

Mr. Jones: That's all, thank you.

Re-re-recross Examination

Q. (By Mr. Picco): Mr. Royce, you say that Dora Royce had charge of appearance and cleanliness and things like that around the shop—I am talking about the Yellow Cab, Portland—her services?

A. No. No, I don't think I said that.

Q. Didn't you state that she had very miscellaneous duties, involved with checking on this and that?

A. On the street.

Q. She was called the—— (interrupted)

The Court: Your question was “around the shop,” I have no such information.

A. No, I didn't refer to a shop. What she would do was to check on cleanliness of the cabs, the appearance of the drivers, cleanliness of the uniforms

(Testimony of Ezra Royce.)

and things of that kind, out on the street, not in the shop.

Q. Now, if she was doing that, she would get to know the drivers very well, wouldn't she?

A. No.

Q. They would get to know her very well?

A. Oh, they'd spot her all right, but she made no attempt to get acquainted with the drivers. That was the thing to keep away from. [268]

Q. Well, how do you explain your statement then that she had a confidential job in checking up for unpaid fares? If she was well-known to the drivers?

A. No, I wouldn't say she was well-known to the drivers. They didn't have any idea that she was doing that kind of work. The minute they get wise to the fact that someone is doing that kind of work, their usefulness is gone, so she kept in the background in that respect entirely.

Q. Now, on that stock certificate, Exhibit 14—the date on that is April 20, is it not?

A. Yes, it's April 20th.

Q. Doesn't that fix in your mind what time the gift of the stock was made?

A. No, I don't know why that's made that way, but the gift of stock was made in January.

Q. Now, you mentioned something about receiving some one hundred and thirty-four thousand shares of common stock of the Aldergold Copper Company?

A. That's what I have, yes.

Q. Well, I just want that explained to the

(Testimony of Ezra Royce.)

Court, so he will understand what you mean by that?

A. I don't know just what kind—what your—
(interrupted)

Q. How did you arrive at that number?

A. That's the statement from the Secretary of the company.

Q. This statement is not in evidence at all. I am just wondering [269] to know how you knew about it?

A. Well, I knew it was about five percent, and the Secretary of the company made that statement to show what it was.

Q. Actually, are you trying to say you don't know exactly the number of shares you did have in the Aldergold Company?

A. The exact number? No, I did not.

Q. Now, do you know what the capital account of the Aldergold Company showed you as being the owner of?

A. Well, that is what their account would show that I was the owner of. If you are talking about that trust account, and which I was not the owner— (unfinished answer)

Q. Well, I wish you would explain that trust account—I am very seriously wanting to find out about that trust account, if you know anything about it.

A. Well, it was a trust account created there so that I would have some control in voting and so on and so forth.

(Testimony of Ezra Royce.)

Q. Now, that—there was over a million shares involved in that, were there not? A. Yes.

Q. And you were supposed to have control over those shares?

A. The trust certificates, yes. No, the common stocks were the ones that were in the trust, and they were—then there were trust certificates issued against that.

Q. You were going to have voting privileges over one million shares of the common stock that you weren't supposed to own it? [270]

A. I didn't own it.

Q. That, if you can explain it, I would like to have you explain that?

A. Well, as I said, that was put in escrow in the old National Bank in Spokane, and trust certificates were issued against that, and went along as a bonus on the preferred stock; but the common stock was still—stayed there, and I had the voting rights on that, for a period of ten years. [271]

* * * * *

F. C. NIEDERKROME

a witness recalled by the Petitioners, assumed the stand and testified as follows:

The Court: You will remember that you are under oath.

Mr. Jones: This witness—has he been sworn?

The Clerk: He was sworn the other day.

Mr. Jones: Oh, yes. This witness' testimony at the present time is on the Hippodrome Amusement Company issue. If the court please, it is stipulated that during the year 1945, the Hippodrome Amusement Company was, and now is a corporation, organized under the laws of Oregon, and that in 1945, the issue of outstanding stock of such corporation was, and now is, owned as follows: E. Royce, two hundred and eighteen shares; B. Royce, a hundred and eleven shares; F. C. Niederkrome, nineteen shares; Stephen Bartel, five shares; and total issued in outstanding shares, three hundred and fifty-three shares.

Direct Examination

Q. (By Mr. Jones): Mr. Niederkrome, are you a Director of that corporation?

A. Yes, I am.

Q. And are you an officer of the corporation?

A. Yes.

Q. What is your office? A. Secretary.

Q. As well as being Secretary, are you the Auditor for the [273] corporation?

A. Yes, I am.

(Testimony of F. C. Niederkrome.)

Q. Did you bring the minute book of the corporation to court? A. I did.

Q. It was asked this morning if there were any minutes with respect to a post office negotiation for the building of a post office at Seaside. Did you look through the books for that purpose?

A. Yes.

Q. Are there any such minutes?

A. There is—there are.

Q. May I—would you refer to them, please?

A. (Referring to minutes) These are the minutes.

Q. Would you resume the witness stand? Have you ever shown me those minutes? Have I ever seen them before, so far as you know?

A. No, you haven't.

Q. I don't know what I am asking for, but I would like to have you read them. What date was the meeting held?

A. (Reading) "Hippodrome Amusement Company. Special meeting of Board of Directors held April 19, 1954."

Q. April 19th? A. 19, 1954.

Q. Please read any motion or resolution or discussion as it pertains only to the post office. There is no use reading the whole record.

A. (Reading) "A quorum was present. Then E. Royce explained [274] to the Directors that he had been negotiating with representatives of the United States Post Office Department on their pro-

(Testimony of F. C. Niederkrome.)

posal to lease from this company, the entire facilities of a building to be constructed on the southeast corner of Edgewood Street and Ocean Way Street, in the City of Seaside, Oregon, together with the ground for building and parking area of approximately five thousand square feet. Approximate cost of construction of the building; probable years rental; and the term of years were fully considered. After careful consideration of the proposal, and any financing, if necessary, the following resolution was unanimously adopted: Whereas, Article 7, of the by-laws require that all instruments under seal, must be authorized by the Board of Directors; therefore, be it resolved that E. Royce as President, and F. C. Niederkrome, as Secretary, be, and hereby are authorized to execute and deliver to the United States Post Office Department, a lease and such other documents as may be necessary or required to complete leasing of the building and land at the southeast corner of Edgewood Street and Ocean Way Street, in the City of Seaside, Oregon. And be it further resolved, that E. Royce as President, and F. C. Niederkrome as Secretary, be, and hereby are authorized, pursuant to Article 7 of the by-laws, to execute such contracts, notes, mortgages, or other instruments as may become necessary to construct and complete the building contemplated under the proposal of the United States Post Office Department to lease, if, and when such lease is approved. No other business appearing, the meeting was adjourned." [275]

(Testimony of F. C. Niederkrome.)

Q. Now, that bears the signatures of F. C. Niederkrome—is that your signature?

A. That's my signature.

Q. Are you acquainted with these signatures?

A. Yes, I am.

Q. Is that the signature of E. Royce?

A. The signature of E. Royce.

Q. Is this the signature of B. Royce?

A. The signature of B. Royce.

Q. When did you—who prepared those meetings—minutes? A. I—I did.

Q. When were they prepared?

A. They were prepared and outlined in the discussion, in the form of a meeting.

Q. But who wrote them up in final draft?

A. I did.

Q. When?

A. The same day. I had them typed.

Q. I have here, Mr. Niederkrome, two exhibits for identification. They are 33 and 34—I am handing you 33 first. It is a photostat. Will you tell me what it is a photostat of?

A. (After examining Exhibit) This is a photostat of the cash journal of the Hippodrome Amusement Company. And it is the right and left-hand side of the journal.

Q. Who keeps those—who kept the record that that is a picture [276] of? A. I do.

Q. Does it show a loan—does it show a sum advanced to Mr. Royce, in December of 1945?

A. It does.

(Testimony of F. C. Niederkrome.)

Q. What date?

A. I don't believe the photostat is all there.

Q. Then we will have to put the originals in.
What account number—— (interrupted)

A. Oh, yes, it is here. December 28th—December 28th.

Q. December what? A. 28th, 1945.

Q. Now, were you present at any meeting of the Directors — the Hippodrome Amusement Company when this was considered — this withdrawal here was considered.

A. Well, it wasn't—the loan request was considered, but it was not a formal meeting.

Q. Where was the request made?

A. In our office at—— (interrupted)

Q. Who was present?

A. E. Royce, B. Royce and myself.

Q. And what was—what was the substance of the conversation?

A. Well, Mr. Royce said he could use this money, and on the basis that if the company would need the money, that he would repay it. It isn't—it wasn't at all unusual, because there have been many [277] times when the company was in financial difficulty, that he advanced money. There were no formal notes signed by the Hippodrome to him, and here was a case where the situation was reversed, and he needed—he wanted—— (interrupted)

Q. A little louder.

A. He wanted to borrow the twenty thousand, so we advanced—we agreed that he could have it on

(Testimony of F. C. Niederkrome.)

the basis that it would be repaid if and when the company required it.

Q. Was that what was said, and the understanding that you and Mr. B. Royce had?

A. That's right.

Q. And that payment to him shows on the books as a what?

A. Amount due as a note as an account receivable, on the books of the Hippodrome Amusement Company against E. Royce.

Q. Is that what it was honestly and truly intended to be, an account receivable?

A. That is what it was intended to be, and is still intended to be.

Q. And do the other interested parties intend that that should be repaid? A. They do.

Q. And has there been any change in its classification on the books since it was entered as an account receivable?

A. Well, the Hippodrome Amusement is on a fiscal year basis—fiscal year ending March 31. Last year, when I prepared the tax [278] returns, and also this question came up about the post office, I noticed that the account that it was charged to involved several other items, and I, on my own volition, without discussing it with anybody, merely set it up as a note receivable. However, I have never asked E. Royce to execute a note.

Q. Well, now, did you owe anything to this company? A. I owe some money.

Q. How much? A. Four hundred dollars.

(Testimony of F. C. Niederkrome.)

Q. When did you take that from the company?

A. In 1948.

Q. And what did you do about it at the same time you—— (interrupted)

A. I also set up an account, note receivable, as to myself.

Q. Prior to the time that these notes receivable accounts were set up, how did this four hundred dollars that you owed show in the books?

A. It was co-mingled with the item charged against E. Royce.

Q. Would you indicate the account and the page of that photostatic exhibit upon which the co-mingled items appear? Just count the pages back?

A. I don't—did you give—this is only the cash journal. There is no ledger sheet in here.

Q. Oh, I will give you the ledger. This is Exhibit Number 34. [279]

A. This is an account titled—bears the account number 103.5, and carried under the name of “Due from Stockholders,” and the first—— (interrupted)

Q. And how much is—— (interrupted)

A. ——entry on that is, is the December entry of twenty thousand dollars.

Q. Where is your entry of four hundred dollars?

A. It appears on the third line, under date of September 30th, four hundred dollars.

Q. May I see the Exhibit a moment? Now, you have been looking at the first page of Exhibit Num-

(Testimony of F. C. Niederkrome.)

ber 34. Now, I am turning to the second page of that Exhibit, and what is that second page?

A. This is an account, entitled "Notes Receivable—E. Royce," and it has our account number 102-C1, an entry on April 1, 1954, for twenty thousand dollars.

Q. Now, while you don't have it there, I see, is there a similar account for you for four hundred?

A. There is a similar account for myself, for four hundred dollars.

Q. All right, now will you refer back to Exhibit Number 33, which is the journal, and show the pages from which these ledger postings came from? Just name the pages—number the pages?

A. It doesn't show any page on here. It shows the—— (interrupted)

Q. No, I mean, is it on the second page of the photostat? This [280] is number two page. What page—just count back—this is number one—count back.

A. Well, this is—on the photostat, it is the second page.

Q. On the second page? Now, what item do you find on the second page of the photostat?

A. An item of twenty thousand dollars.

Q. Under—— (interrupted)

A. Charged to E. Royce.

Q. Under what date?

A. On August—on December 28, 1945.

Q. Then that is when it was carried as an account receivable?

A. Yes.

(Testimony of F. C. Niederkrome.)

Q. Now, then, turn to the page in the journal where that was taken out and put in again as a notes receivable?

A. The page in the journal is—is on April 1, 1954.

Q. Let me see this. Is that the last page of the photostat?

A. That's the last page—I will give you the page number—one, two, three, four—it is page five.

Q. Well, just the last one. Page five, the last page. Mr. Picco has asked for some surplus accounts of this company. I am going to let him ask his own questions, but I will at least identify them for you.

Mr. Picco: All I want to ask. We don't have to put anything in. The earned surplus on December 28th, 1945, was in excess of twenty thousand dollars? [281]

A. I can't definitely say that, because this is a fiscal year corporation, and the earned surplus on March 31, '46, was in excess of twenty-one thousand. Just exactly what it was on December 31, I am unable to say. The previous year, on March 1, '45, the earned surplus was sixteen thousand five hundred and seventy-six dollars and thirty-four cents. After an operation of twelve months later, March 31, '46, we earned during the year, five thousand a hundred and twenty-seven dollars and six cents, making the surplus as at March 31, '46, twenty-one thousand seven hundred and three dollars and forty cents.

(Testimony of F. C. Niederkrome.)

ber 34. Now, I am turning to the second page of that Exhibit, and what is that second page?

A. This is an account, entitled "Notes Receivable—E. Royce," and it has our account number 102-C1, an entry on April 1, 1954, for twenty thousand dollars.

Q. Now, while you don't have it there, I see, is there a similar account for you for four hundred?

A. There is a similar account for myself, for four hundred dollars.

Q. All right, now will you refer back to Exhibit Number 33, which is the journal, and show the pages from which these ledger postings came from? Just name the pages—number the pages?

A. It doesn't show any page on here. It shows the—— (interrupted)

Q. No, I mean, is it on the second page of the photostat? This [280] is number two page. What page—just count back—this is number one—count back.

A. Well, this is—on the photostat, it is the second page.

Q. On the second page? Now, what item do you find on the second page of the photostat?

A. An item of twenty thousand dollars.

Q. Under—— (interrupted)

A. Charged to E. Royce.

Q. Under what date?

A. On August—on December 28, 1945.

Q. Then that is when it was carried as an account receivable?

A. Yes.

(Testimony of F. C. Niederkrome.)

Q. Now, then, turn to the page in the journal where that was taken out and put in again as a notes receivable?

A. The page in the journal is—is on April 1, 1954.

Q. Let me see this. Is that the last page of the photostat?

A. That's the last page—I will give you the page number—one, two, three, four—it is page five.

Q. Well, just the last one. Page five, the last page. Mr. Picco has asked for some surplus accounts of this company. I am going to let him ask his own questions, but I will at least identify them for you.

Mr. Picco: All I want to ask. We don't have to put anything in. The earned surplus on December 28th, 1945, was in excess of twenty thousand dollars? [281]

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(Testimony of F. C. Niederkrome.)

Mr. Picco: Better get that in then.

Mr. Jones: Is that satisfactory?

Mr. Picco: Will you stipulate that into this record?

Mr. Jones: What he just said?

Mr. Picco: Yes.

Mr. Jones: Oh, surely. That is stipulated, that those facts are correct. Now, I would like to, at this moment, offer Exhibit 33 in evidence.

Mr. Picco: What was that?

Mr. Jones: I offered Exhibit 33.

Mr. Picco: No objection.

The Court: It will be received.

(Petitioner's Exhibit 33, witness Niederkrome, received in evidence.)

Mr. Jones: Exhibit 34, we offer in evidence.

Mr. Picco: No objection. [282]

The Court: It will be received.

(Petitioner's Exhibit 34, witness Niederkrome, received in evidence.)

Q. (By Mr. Jones): All right. At the same time, in December of 1945, or any time in '45, were any other—were any amounts paid to any of the other—or withdrawn, or advanced to, or loaned to any of the other stockholders?

A. No, there wasn't.

Q. Has any amount ever been withdrawn in any way by B. Royce? A. None.

Q. Or by Stephen Bartel? A. None.

Q. Then you, in '48, and Mr. E. Royce, in '45, are the only ones that have ever made any loans

(Testimony of F. C. Niederkrome.)

from the company? A. That is correct.

Q. My the way, your own loan, is that to be repaid? A. It certainly is.

Q. At the time that Mr. Royce got this, did he say he would repay it? A. He did.

Q. Has he ever repudiated that? A. No.

Q. And has there ever been discussion about when he intended to repay it? [283]

A. Well, this matter of repayment came up for discussion during the negotiation with the Post Office, because it was evident that we would have to have money, approximately way in excess of thirty thousand dollars, and it was then discussed that it would be necessary for he and I both to reimburse the corporation.

Q. And was there a willingness expressed to do that? A. Yes.

Q. Now, then, was there ever—(interrupted)

A. It certainly would not be fair to the other stockholders for us not to repay it and to go out and finance money at a rate—at a higher rate of interest, perhaps.

Q. Was there ever any other attempts to improve that property or—in addition to this post office?

A. We have made improvements down there several years ago.

Q. I am speaking about the Oregon Motor Stages—was there any attempt then to do something—(interrupted)

A. Well, of course, I don't remember too much about that—it was some time ago, but I do know

(Testimony of F. C. Niederkrome.)

that there was negotiation going on. We have always have been trying to get rental—renters and develop new source of revenue, and at that time, Mr. Royce was negotiating.

Q. Were the negotiations at any time with Greyhound Stage Line?

A. He's negotiating with them now.

Q. And if any of those propositions go through, these loans from [284] you and Mr. Royce would be repaid then?

A. We expect to repay them.

Q. What is the value of the property down there?

A. Well, the corporation has the book value of somewhere around seventy thousand—net worth of seventy thousand dollars, but that is far below what I think the actual present-day value—(interrupted)

Q. What's your actual idea of the value of the assets on market?

A. Oh, probably a hundred and forty thousand.

Q. Cross-examination—no, I will go to the next issue.

The Court: Net or gross?

A. No, a hundred and forty thousand—the property is worth that much; the lands and buildings, improvements. Net worth is seventy thousand dollars, approximately.

Q. Now, Mr. Niederkrome, we will proceed to the partnership issue in Portland. I believe you testified the day before yesterday that you were the Auditor of this Seattle partnership—or the Portland partnership?

(Testimony of F. C. Niederkrome.)

A. Yellow Cab Company; yes.

Q. Of the Yellow Taxicab Company?

A. Yes.

Q. And that prior to that time, you were the Auditor of the preceding corporation?

A. Yellow Cab, Incorporated, yes. [285]

Q. Yes. Now, you were a Director of the old Yellow Cab Corporation, weren't you?

A. I was.

Q. And that was called, I believe, Yellow Cab, Inc., an Oregon corporation? Incorporated was spelled out, was it?

A. The official name was Yellow Cab, Incorporated, spelled out.

Q. I see. Were you present at a meeting in August—on August 1st, 1942, when a complete dissolution was authorized? A. I was.

Q. And if I recall correctly, those minutes are in evidence here, I will show them to you, Exhibit 34—24, I made a mistake. Thank you. Now, I am handing you Exhibit Number—Petitioner's Exhibit Number 24, and on the front of it is a waiver of notice of meeting. There are several names on it. One, two, three, four, five, six, seven—seven names. Were all the people whose names are on that waiver, were they stockholders at the time? A. Yes.

Q. And they were at the meeting? A. Yes.

Q. Now, is that your signature—of a photostat of your signature—(interrupted)

A. It is, yes.

(Testimony of F. C. Niederkrome.)

Q. —as the Secretary, and you wrote those minutes? A. Yes. [286]

Q. May I see them a moment, please? (Exhibit handed) Now, that was the dissolution meeting of the corporation, is that correct?

A. That is right.

Q. After that, the partnership was organized?

A. Yes.

Q. A bill of sale then went from the partners over to the new partnership, is that correct?

A. That's right.

Q. After the dissolution was made? Now, let me see that, that is Exhibit number 26, please. Well, I guess it just went straight over—in the liquidation from the corporation to the partnership, is that the way it was handled?

A. Yes, that's the way it appears here—from the corporation to the—(interrupted)

Q. Now, what—(interrupted)

A. —partnership.

Q. —a man by the name of Luton, and another by the name of Keefer, is it—Keefer or Keffer?

A. Keffer.

Q. Keffer. They were in the old corporation?

A. They were in the corporation.

Q. And then they are also—are these the same men whose names appear on the partnership articles which are Exhibit 25?

A. They also appear in the bill of sale. [287]

Q. I will show you, Mr. Niederkrome. If you will turn to the signatures on Exhibit 25.

(Testimony of F. C. Niederkrome.)

A. (Referring to Exhibit)

Q. Is that the same Mr. Keffer and Mr.—what do you call him, Luton? A. Luton.

Q. Mr. Luton, who was—who were the stockholders in the preceding corporation?

A. That's right.

Q. And these partners here had been partners—or had been stockholders in the preceding corporation? A. They had been.

Q. Thank you. Now, I would like you to take Exhibits 28, 29, 30 and 31, and explain the capital investment and drawings of the partners in this Portland Yellow Cab partnership? Before you go into any discussion—answer that question, I am handing you Exhibit 31, and ask you to state what it is, please? (Exhibit handed)

A. Exhibit 31 is the surplus account of E. Royce—or, in other words, the profit and loss and drawing account of E. Royce and Dora F. Royce, in the Yellow Cab Company of Portland partnership.

Q. Very well, and are these figures on it made—were they made by you?

A. No, not necessarily. I don't—(interrupted)

Q. Are you in charge of the books there?

A. I am in charge, but I didn't make these figures. [288]

Q. Somebody under you—somebody that works under you make them?

A. Someone under my direction.

Q. Are the books in your care?

A. They are in my care.

(Testimony of F. C. Niederkrome.)

Q. Do you know that these are the actual records of the drawings?

A. They are the actual records of the drawings.

* * * * *

Q. Now, looking at the Exhibits that I mentioned—I will take these bill of sales, partnerships—which were 28, 29, 30 and 31, will you state the capital of the partners—of Mr. E. Royce, and of Mrs. Dora F. Royce? [289]

A. In reference to Exhibit number 28, this is a closing journal entry of the Yellow Cab Incorporated. This does not show the respective entries of the partners in the new partnership—it merely closes out the surplus account in the corporation.

Q. All right, what does the opening journal entry—(interrupted)

A. The opening journal entry—the opening journal entry reflects the assets and the liabilities as they were conveyed from the corporation to the partnership, and then goes on to reflect the partnership capital of each of the partners mentioned in the assumed business certificate or the bill of sale.

Q. All right, now, what interest is the interest of Mr. E. Royce there?

A. His interest is twenty-six point one five seven five percent.

Q. And Mrs. Dora F. Royce?

A. Dora F. Royce is twenty-three point oh six percent.

Q. Now, the figures which you have been reading, together with the interest of the other partners,

(Testimony of F. C. Niederkrome.)

can be found near the bottom of the second page of Exhibit number—(interrupted)

A. Second page of Exhibit number 29.

Q. Twenty-nine. Very well. Now, is there any way that you can identify from these liquidating entries of the corporation, that the same assets went into the partnership?

A. Yes, there is merely a—the mere difference is that in the corporation, the assets account were credited out and the liabilities [290] charged out, the same entry was taken and reversed on the partnership. The entries were closed out of the corporation through an entry called “Liquidating Account.” It was then immediately transferred into the partnership books.

Q. All right, now, the capital then, that was transferred over and was divided on the second page of Exhibit number 21?

A. Twenty-nine.

Q. Twenty-nine, in accordance with the partnership agreement?

A. Right.

Q. Very well. Now, let's talk of the drawings here for a minute. Give me anything you don't need—I will take them—as far as drawings are concerned. Now, then, in dollars and cents, what is the—what was the capital—did Mr. E. Royce and Mrs. Dora F. Royce invest in the Portland partnership?

A. Well, Mr. E. Royce—Royce's interest, was twenty-one thousand, two hundred and ninety-five dollars and twenty-three cents.

(Testimony of F. C. Niederkrome.)

Q. And Mrs. Royce's—Mrs. Dora F. Royce?

A. Mrs. Dora Royce was eighteen thousand, seven seventy-three fifty-one.

Q. Thank you. I will take that Exhibit. Now, you were speaking from Exhibit number 30 then. What page from 30 were you referring to?

A. I was referring to page one and page—page six. Page one and page six.

Q. Thank you. Now, you have what Exhibit in your hand? [291]

A. This is the original ledger sheet of the profit and loss account of E. Royce and Dora F. Royce in the Yellow Cab partnership of Portland.

Q. Does it show their distributions?

A. It does.

Q. Will you read into the record, the distributions to Mrs. Dora F. Royce, for the years '44 through '47?

A. The distribution in 1944, in April, fourteen thousand a hundred and eighty-seven dollars and seventy-five cents. In June, eleven thousand five hundred and thirty dollars—and—yes, eleven thousand five hundred and thirty. September, eleven thousand five hundred and thirty. December, eleven thousand five thirty. In 1945, the distribution was—in February, eleven thousand five thirty; in May, eleven thousand five thirty; in August, eleven thousand five thirty; in September, eleven thousand five thirty; in December, twenty-three thousand sixty dollars. Do you want 1946?

Q. '46 and '47.

(Testimony of F. C. Niederkrome.)

A. And '46, February, eleven thousand five hundred and thirty; May, eleven thousand five thirty; August, eleven thousand five thirty; October, eleven thousand five thirty. In 1947, September, four thousand six hundred and twelve dollars. 1948—(interrupted)

Q. No, we don't need '48. [292]

* * * * *

Direct Examination—(Continued)

Q. (By Mr. Jones): I am handing you a group of checks marked Petitioner's Exhibit 40, and ask you to look at them, and to state if you made them, and what they are? (Exhibit handed)

A. Well, these are checks drawn on the general fund of the Yellow Cab Company, made payable to Dora F. Royce, and they represent her withdrawals from the partnership.

Q. And I would like to have you—or have you check those checks off already against the exhibit that you were last mentioning when you read off her withdrawals? A. No, I haven't.

Q. May—that was Exhibit—(interrupted)

Mr. Picco: Thirty-one.

Q. Thirty-one. May we have it? I would like to have you state if those are the checks that represent the withdrawals shown on Exhibit 31?

A. (After comparing) Well, I will say they are—two checks [293] in April, one for twenty-six fifty-seven seventy-five, and one for eleven thousand five thirty, which make up this item of four-

(Testimony of F. C. Niederkrome.)

teen thousand a hundred and eighty-seven seventy-five.

The Court: Speak a little louder.

Q. Speak louder.

A. There are two checks in April, 1944, one for eleven thousand five thirty; one for two thousand six fifty-seven seventy-five, which make up the items of her April withdrawal, totalling fourteen thousand one eighty-seven seventy-five cents.

Q. Now, each time, say whether or not that checks with your exhibit there?

A. That checks with the Exhibit 31. In June, there was a check for eleven thousand five hundred and thirty dollars, which is the total withdrawal for June, and it checks with Exhibit 31. In September, there is a check for eleven thousand five hundred thirty dollars, which is the total withdrawal for September 1944, and it checks with Exhibit 31. December, there is a check for eleven thousand five thirty, and it checks with the total withdrawal for December 1944—checks with the Exhibit number 31. And February 1945, there is a check for eleven thousand five thirty, and that also checks with Exhibit number 31. In May 1945, a check for eleven thousand five thirty, which also checks with the amount shown on Exhibit 31; in August, a check for eleven thousand five thirty, which is the total amount drawn for August, 1945, and checks with the Exhibit number 31. [294]

The Court: Can't you shorten this?

(Testimony of F. C. Niederkrome.)

A. I beg your pardon?

The Court: Can't you shorten this? Can't you shorten this by checking them all and see if they all check?

Q. Just check them all and see if they all check?

A. September checks—(interrupted)

Q. Don't talk out loud. Just wait until you get the answer for the whole group.

A. There is one in December that does not check. A withdrawal of twenty-three thousand sixty dollars, and I only have a check for eleven thousand five thirty. February—and the rest of the checks check with the Exhibit.

Q. Now, this check that you said—(interrupted)

The Court: Where does that bring you up to?

A. To December of 1947.

Q. Now, then, the check that you said—one check was missing, for what month is that?

A. December—December 1945. The amount of the check is eleven thousand five thirty.

Q. Do you know whether or not the check was written?

A. It was written.

Q. Was it written to Dora Royce?

A. It was.

Q. It is one that you can't locate?

A. Can't locate it—it has probably been misplaced by someone [295] in the office.

Mr. Jones: Well, we would like to offer those checks, Exhibit number 40, in evidence.

Mr. Picco: No objection.

(Testimony of F. C. Niederkrome.)

The Court: Exhibit 40 in evidence.

* * * * *

Q. (By Mr. Jones): Now, have you made an analysis, Mr.—this is still directed to the Seattle account, as far as Eunice and her trust is concerned—have you made an analysis of the trust, Mr. [296] Niederkrome?

A. Yes, I have made an analysis of the Seattle drawing account.

Q. Now, I am handing you—I am handing you here, a statement which will be marked for identification, 41.

The Clerk: Petitioner's Exhibit 41 for identification.

(Petitioner's Exhibit 41, witness Niederkrome, marked for identification.)

Mr. Jones: And would you please mark that also?

The Clerk: Petitioner's Exhibit 42 for identification.

(Petitioner's Exhibit 42, witness Niederkrome, marked for identification.)

Q. Now, 41, would you please explain what 41 is? (Exhibit handed)

A. Well, this is an analysis, or a check I made of Mr. E. Royce's trustee bank account at the United States National Bank, and I determined the deposits that are reflected in his passbook and checked them against the drawing account of the Yellow Cab Company of Seattle, and I found that

(Testimony of F. C. Niederkrome.)

he reflects in his passbooks, all the items that are shown in the drawing account of the Seattle Yellow Cab Company, for the account of E. Royce, trustee for Eunice M. Royce.

Q. May I see it a moment? (Exhibit handed)
Now, I want then to show you—well, I will offer this in evidence first.

Mr. Picco: I have a few questions. Now, this is taken primarily from the passbook, is that right?

A. The information I have is from the passbook.

Mr. Picco: And it was compared against the—the withdrawals in the drawing accounts of the books in Seattle—Yellow Cab?

A. Yellow Cab Company.

Mr. Picco: That's fine. This is what you used? Exhibit 37?

A. That is correct.

Mr. Picco: No objection.

Q. All right, now, I am handing you—(interrupted)

The Court: You are offering that Exhibit are you? Are you offering that in evidence?

Mr. Jones: Yes, I did, your Honor.

The Court: Forty-one?

The Clerk: Forty-one.

Mr. Jones: Forty-one, yes, sir.

The Court: It will be received.

(Petitioner's Exhibit 41, witness Niederkrome, received in evidence.)

Q. Now, I am offering—I am handing you for

(Testimony of F. C. Niederkrome.)

identification, Petitioner's Exhibit 42, and ask if you prepared that? (Exhibit handed)

A. This is—I did prepare this.

Q. What is it?

A. It is a statement for—the tabulation of the checks issued by E. Royce, trustee, against the trustee account with the United States [298] National Bank.

Q. Does that show the missing checks?

A. It does.

Q. And the missing checks, I believe, are numbers six, eighteen, twenty, twenty-one, thirty-two and thirty-five, is that correct?

A. Well, I can't determine it from this list.

Q. Is missing—does your record there show that check number six is a First National—is a check to the First National Bank for sixty-thousand dollars?

A. It is a check to the First National Bank, as I determined the—as I found it to be made out from the stubs, in the check book.

Q. Yes. A. For sixty thousand dollars.

Q. And check eighteen, to J. W. Maloney, for ten thousand one ninety-seven eighteen?

A. Number eighteen, yes, right.

Q. And check twenty, to Eunice Royce for two hundred dollars? A. Two hundred dollars.

Q. And check twenty-one is what?

A. That's for J. W. Maloney, Collector, four thousand dollars.

Q. Check thirty-two?

(Testimony of F. C. Niederkrome.)

A. Is to Royce, Incorporated, for five thousand dollars.

Q. And check thirty-five?

A. That is to Eunice Royce, three hundred dollars. [299]

Q. Now, did Mr. Royce indicate to you which of those checks were loaned to him?

A. He indicated to me that these were loans. I don't know as I—(interrupted)

Q. Well, loans—(interrupted)

A. —specifically asked him whether they were to him or to someone else.

Q. That's these loans? A. Yes.

Q. Did you make a column showing the loans?

A. I did.

Q. Have you indicated on that column—in that column, such loans as haven't been repaid?

A. I have.

Q. May I see? What was the beginning balance in this account in 19—let's see, this is on a fiscal year, isn't it?

A. I didn't—I didn't determine the balances on this account.

Q. Do you know what the balance in the account in December 31st, 1949, was?

A. Well, the total deposits were two hundred and five thousand a hundred and fifty-four ninety-four. Checks issued were a hundred and eighty-six thousand, forty-six dollars and twenty-one cents, leaving a balance of nineteen thousand one hundred and eight dollars and seventy-three cents.

(Testimony of F. C. Niederkrome.)

Q. Would you repeat that last figure? [300]

A. Nineteen thousand one hundred and eight dollars and seventy-three cents.

Q. Thank you.

Mr. Picco: What period of time does this cover?

A. That is for the years '49 through—'44 through '49.

Mr. Picco: And where are the checks upon which this is based?

Mr. Jones: They are in evidence.

A. You have them in evidence.

Mr. Picco: Oh, those are in evidence?

A. Yes.

Mr. Picco: So you haven't—you haven't tried to describe what the loans were to. The checks will explain that as much as possible, is that right?

A. No, I don't try to—I haven't tried to describe who the loans were made to.

Mr. Picco: Those are the checks that I examined—(interrupted)

Mr. Jones: Mr.—those are the ones you examined Mr. Royce on.

Mr. Picco: —Mr. Royce on. No objection.

The Court: Are you offering it?

Mr. Jones: I am offering that in evidence, yes.

The Court: Exhibit 42 in evidence.

(Petitioner's Exhibit 42, witness Niederkrome, received in evidence.) [301]

Mr. Jones: Inasmuch as we are not identifying those, I would like to stipulate with you before the day is over, sometime, what my Seattle Exhibits are

(Testimony of F. C. Niederkrome.)

—we have pretty well identified them, and had them identified, Mr. Picco. I don't want any slip-up—on Exhibits 21—I will tell you the ones I want to identify here—are 20 and 21—may I see them? (Exhibits handed) Thank you. I would like to stipulate that Exhibit 20 is the journal—or pages from the journal—this is 20—pages from the journal of the Yellow Taxicab of Seattle, a partnership, setting forth the entries opening the books of the partnership, May 1st, 1944.

Mr. Picco: That has been received, hasn't it?

Mr. Jones: It has been received, but it has never been explained as to what it is.

Mr. Picco: I agree with that.

Mr. Jones: All right. Then I would like to also stipulate with you that Exhibit 21 consists of sheets from the general ledger of the partnership of the Seattle Yellow Taxicab Company, showing the partnership accounts of E. Royce, E. Royce, trustee of E. M. Royce, and Dora F. Royce, and the drawing accounts of each of the persons for the years 1945 through '53.

Mr. Picco: I agree to that.

Mr. Jones: Thank you. Now, in order to save time, I am not going to ask this witness to go through and analyze those accounts as I did for Portland, but we would do it in the same way. You may cross-examine this witness. [302]

Cross Examination

Q. (By Mr. Picco): Just generally, without

(Testimony of F. C. Niederkrome.)

going into the specific issues that you are here testifying about—you are related to Ezra Royce, aren't you? A. Yes.

Q. What is the relation?

A. He's my brother-in-law.

Q. Now, the Petitioner, Ezra Royce is the active member of the Hippodrome Amusement Company and the Yellow Cab Company of Portland, is he not?

A. Well, I believe his brother has always been quite active too. And I have taken some interest in the Hippodrome Amusement Company. I am a stockholder.

Q. Now, as far as the Petitioner Barney Royce is concerned, he has been rather inactive for years, hasn't he?

A. Well, he comes up here three or four times a year. He usually discusses with me quite a number of things.

Q. Hasn't he been living in California for the last—(interrupted)

A. That's right; living in California.

Q. How long has that been going on?

A. Well, his home, until recently, has been in Vancouver, Washington. He had just taken—he sold his home in Vancouver last summer, and I would say that he is probably making his permanent residence in California now. [303]

Q. But prior to that time he was in California on account of health reasons? During the years in question here?

(Testimony of F. C. Niederkrome.)

A. He originally went there because of his wife's health.

Q. Now, would you say—is it a fair statement to say that Ezra Royce is the dominant personality of the group? A. He's the most active, yes.

Q. And he has the controlling stock interest in these ventures? A. In the what ventures?

Q. The Hippodrome?

A. He does in the Hippodrome, yes.

Q. And Yellow Cab?

A. He doesn't control the Yellow Cab Company.

Q. You take your instructions and orders from the Petitioner, Ezra Royce, don't you?

A. Quite often; sometimes from B. Royce.

Q. You work under Ezra Royce?

A. Yes. To a considerable extent, at least.

Q. Now, going to Hippodrome Amusement Company. Steps were being taken to remodel the building, or to construct a new one in 1945, isn't that correct?

A. No, I *don't* there were any steps to remodel the building in '45.

Q. When were steps taken?

A. There was no remodeling done until just three or four years ago. [304]

Q. When did these plans come into conception?

A. With reference to the post office?

Q. No, with reference to remodeling the building or constructing a new building?

A. Well, that was during—that is during, I

(Testimony of F. C. Niederkrome.)

think, probably '48, '49—I am not certain as to the date on the—with reference to the Oregon Motor Stages—(interrupted)

Q. That's right. I mean, weren't you thinking about those things in 1945 and 1946?

A. I don't think they had developed at that stage—'45.

Q. You were thinking of using—of constructing a building so that Oregon Motor Stages could use it?

A. I am not sure that that was in '45.

Q. Well, do you know what year it was?

A. I did—it was a later year.

Q. Was it '47?

A. It could possibly be, yes.

Q. Now, wasn't there a need then for that money?

A. It didn't get into any final stages of construction on it. In fact, there was never any agreement entered into to construct the building.

Q. Did you tell me—didn't you tell—didn't you say on direct examination that improvements were made several years ago?

A. Several years ago.

Q. Now, at that time, wasn't there a need for the money? [305]

A. Didn't require—we had enough money to do it. Didn't require any extra funds.

Q. What sort of improvements were those?

A. Oh, we installed a new furnace; installed a kitchen for the purpose of using the facilities for conventions, and we installed a new entrance.

(Testimony of F. C. Niederkrome.)

Q. Now, were there any records of minutes authorizing the payment of twenty thousand dollars to Ezra Royce?

A. No, it was an informal agreement.

Q. Ezra Royce just requested the money, is that it?

A. Yes.

Q. His requests were normally complied with, as a matter of course, were they not?

A. Yes; so were mine. And so were B. Royce's.

Q. Wasn't that a rather unusual situation, you can just use the corporation when you wanted to, is that it? Is that what you are trying to tell the Court?

A. That isn't the situation exactly. He has been—both he and B. Royce have, at times, come—come to the rescue of the corporation in those years, when the corporation was going through lean profits, and had a deficit for about ten years, and they advanced the corporation money, to help it out. And I, as a minority stockholder, did not feel that it was unreasonable to help—or to accommodate them—to accommodate Mr. E. Royce with twenty thousand dollars, as long as the corporation was not needing the funds. [306]

Q. When did this happen—that the corporation was in need of funds?

A. It—there were a good many years prior to '45. I think my surplus account will show that we carried a deficit there for probably ten years. And during that period, both E. Royce and B. Royce

(Testimony of F. C. Niederkrome.)

came forth with advances to carry the corporation through this situation.

Q. That was in the earlier years? A. Yes.

Q. In the thirties?

A. And when the situation was reversed, I was not opposed to making an accommodation.

Q. Now, you mentioned that changing of the account receivable to a note receivable—that was in 1954, was it?

A. Yes, I did that in March—after the closing of the books on March 31. I did that on my own volition. I didn't discuss this with anybody. I had no reason to do it, other than we were thinking of—we were discussing—a negotiation with the Post Office Department, and it would then be necessary to have the funds. And the matter came to my attention, and I merely attempted to—to set the accounts up and segregate them, so the items would not be co-mingled. I did not ask Mr. Royce at that time to sign a note, and insofar as the negotiations fell through, there has nothing been done about it.

Mr. Jones: Mr. Niederkrome, I don't think that the Judge [307] can possibly hear you unless you speak up.

Q. Actually, there was no reason for changing the account at all, was there?

A. There wasn't.

Q. If you people wanted to repay, you could have done it without putting a note into the thing, at that time, as late as 1954, is that right?

(Testimony of F. C. Niederkrome.)

A. We can instate a note there any time, I presume.

Q. Your reason, would you say that it was a personal reason for changing that account?

A. I did it on my own initiative.

Q. Did you do it because of this examination in the income tax liability of Mr. Royce and the other Petitioners?

A. No, sir, as a matter of fact, there has only been about two months that I knew that this was in issue, and the deficiency assessment against him. I did not know this before. I have never seen his deficiency notice. I didn't know what the assessments were, or what the deficiencies——(unfinished answer)

Q. You didn't know anything about it until just recently?

A. About two months ago.

Q. Now, that four hundred dollars that you speak of, when was that borrowed?

A. That was in '48.

Q. Did you pay any interest on that?

A. I haven't yet. [308]

Q. And that hasn't been paid, either?

A. No. [309]

* * * * *

Q. (By Mr. Picco): I give you Petitioner's Exhibit number 42, and will you tell me when this payment was made down here—what is the amount?

A. This item—three items, were paid at one time in 1950.

Q. They were paid in 1950?

(Testimony of F. C. Niederkrome.)

A. I believe they were paid in 19——(interrupted)

Q. Do you know that as a fact, or later than 1950?

A. If my memory serves me right, they were paid in 1950.

Q. There were just three items that were repaid, is that correct? A. Yes. [310]

Q. There was five thousand dollars; one thousand; and eleven hundred?

A. Yes, all to——(interrupted)

Q. Royce, Incorporated?

A. Royce, Incorporated, and they have been repaid.

Q. Those were the only items that were repaid?

A. That's right.

Q. If you please, to get back to the Hippodrome Amusement issue just for one minute. Now, you mentioned the minutes—1954 minutes—April 19, 1954—and at this time, the company—the Hippodrome Company, was actually interested in constructing a building, is that correct?

A. That's right.

Q. Now, was there a payment on that account receivable at that time? A. No.

Q. Was there—did you ever ask for repayment at that time? A. No.

Q. Of the twenty-thousand-dollar loan?

A. No.

Q. Was it contemplated—was repayment of the loan contemplated at that time?

(Testimony of F. C. Niederkrome.)

A. It was; it was discussed at that time, because it would be necessary to have far in excess of twenty thousand dollars to construct this building. [311]

Q. That is——(interrupted)

A. It would not only be necessary to collect this money from E. Royce, but also to perhaps arrange for financing of some amount, pending on what the building would cost. I am sure that it would cost thirty thousand dollars at the minimum.

Mr. Jones: Mr. Niederkrome, let me remind you again: It would help the Judge a great deal if he can hear the story here as well as read it.

Q. Now, actually, there is no mention of that in the minutes here, which talk about the financing of that? A. There isn't, no.

Q. I hope I don't take too long with this, it has been read into the record, but at the time, it was read rather fastly, and I would like to have a repeat on it; and that is—will you just describe just what the earned surplus account was for Hippodrome, on December 28, 1945. And do what you did before, just a repeat on it?

A. Well, as I explained before, this corporation is on a fiscal year basis, and the earned surplus on March 31, 1944—'45—1945, was sixteen thousand five seventy-six thirty-four.

Q. Now, what date was that?

A. On March 31, 1945.

Q. Yes.

A. Now, then, twelve months later, they had

(Testimony of F. C. Niederkrome.)

earned five thousand one hundred twenty-seven dollars and six cents, and the operation for twelve months, and the earned surplus at March 31, '46, was twenty-one [312] thousand, seven hundred three dollars and forty cents.

Q. And what date was that?

A. March 31, 1946.

Q. And the profit earned during that fiscal year was how much?

A. Five thousand one hundred twenty-seven dollars and six cents.

Q. Thank you.

* * * * *

Redirect Examination

Q. (By Mr. Jones): Until the project had been closed with the Post Office or with Greyhound Motor Stages—Pacific Greyhound, or with old Oregon Motor Stages, you didn't have any need for the money, did you?

A. There was—there was no need to have a repayment made. The matter of paying was discussed at the time this negotiation came up with the Post Office Department, but there was no need for actual repayment of any part of it.

Q. Yes, but what I mean, it was to be repaid then, if the project went through?

A. Had the Post Office Department approved our lease, it would have been necessary. [313]

Q. And it would have been—it would have been paid then? A. Yes.

Mr. Jones: That's all.

(Testimony of F. C. Niederkrome.)

Mr. Picco: One other question.

Recross Examination

Q. (By Mr. Picco): At the time that this money was turned over to Ezra Royce in December 28 of 1945, did you consider the possibility of declaring a dividend to that extent?

A. No, we never did.

Mr. Picco: That's all.

The Court: You're excused.

A. The company did not have the necessary points to declare a dividend at that time.

* * * * *

DORA F. ROYCE

a witness called on behalf of the Petitioners, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record?

The Witness: Dora F. Royce, 410 Southwest Edgecliff Road. [314]

Direct Examination

Q. (By Mr. Jones): Mrs. Royce, how long have you been a resident of Portland?

A. Since 1920.

Q. How long have you been married to Mr. E. Royce? A. 1923.

Q. Mrs. Royce, prior to your marriage, what was your occupation? A. I was a milliner.

Q. Where did you work?

A. Various places. Salem, Tacoma, Seattle.

(Testimony of Dora F. Royce.)

Q. In what capacity in the milliner business did you devote your—to what activity did you devote yourself?

A. Well, I was a designer, and I——(interrupted)

Q. Did you ever have charge of a millinery department?

A. Well, I did, yes. I had——(interrupted)

Q. Where was that?

A. Well, that was in Toppenish, Washington; Lewiston, Idaho; I also did the buying for—for those shops.

Q. Did you have any kind of experience that made you have to look out for and be responsible for the expenses and overhead of a business?

A. Yes, I did.

Q. Where was that?

A. Well, that was in Lewiston, Idaho.

Q. And what——(interrupted)

A. And also in Tacoma, Washington.

Q. And what about your work in Seattle? [315]

A. Well, I was with McDougall and Southwick there, yes.

Q. Did you have a designing position there?

A. I did, yes.

Q. Did that put other people under your supervision? A. It did, yes.

Q. And then did you work in Portland for a while? A. Yes, for a short time.

Q. Now, were shares of stock given to you in 1942, in the corporation that preceded the present

(Testimony of Dora F. Royce.)

Yellow Taxicab partnership? A. That's right.

Q. I would like to show you, a certificate—number—Exhibit number 23. I am going to direct the examination first to Portland, your Honor. I am handing you here the Petitioner's Exhibit number 23, and ask you if that represents the shares that were given to you? (Exhibit handed.)

A. Yes, it does.

Q. And this is for fourteen hundred shares of the common stock of the Yellow Cab, Incorporated, the corporation. Now, when that was given to you, was that given to you outright? A. It was.

Q. As your own stock? A. It was.

Q. No strings attached to it? A. No.

Q. After that was given to you, and came into your possession, [316] was a partnership of the old stockholders formed? A. That's right.

Q. The corporation was liquidated out of the picture, and the old stockholders became partners?

A. That's right.

Q. In a partnership. Have you been a partner in that since? A. That's right.

Q. Do you regard yourself in every sense of the word as a full partner? A. I certainly do.

Q. And do you do any work for that partnership? — A. Yes, I do.

Q. And particularly between the years 1944 and 1947, what were your duties?

A. Well, it was to check the cabs, as to the—and the drivers as to their uniforms, whether they were carrying out the orders that they were sup-

(Testimony of Dora F. Royce.)

posed to. I would check them at the various hotels, depots, or any place where I would happen to see a cab, I would check the time of day, and whether they had passengers in their cabs or not, and whatever I thought wasn't being done right, that, I would write down and send into the office.

Q. And how much time did you devote to doing work of this kind during the years '44 through '47?

A. Well, there were times I was down every-day, and then, of course, there might be different times, maybe I didn't go down for [317] three or four days.

Q. And how much, percentagewise, or however you can make the best estimate, how much of your full day would you figure that on the average, month after month, you would put into this kind of work? A. On the average for the month?

Q. Well, I don't know that you can just take one month, but over a period of time, what portion of your time did you feel is devoted to this? Take an eight-hour day. How much of an eight-hour day did you figure that you devoted?

A. Well, I don't know as I could figure that, because some days I might be downtown all day, and then maybe three or four days, or maybe a week would go by, and I wouldn't be down more than one or two hours.

Q. But you were constantly at it?

A. Oh, yes.

Q. Now, did you receive drawings from this company? A. I did.

(Testimony of Dora F. Royce.)

Q. What did you do with the money you received? A. Well, I put it in my account.

Q. And what did you do with the money though—how did you dispose of it, if you did dispose of it? A. I don't know as I——(interrupted)

Q. What did you buy?

A. Oh, what did I use the money for?

Q. Yes. [318] A. Well, various things.

Q. Well, tell us some?

A. Well, I bought, first things, some cars.

Q. What kind of cars?

A. Well, New Yorker, Chrysler, Cadillac.

Q. How many New Yorkers? A. Two.

Q. How much did they cost?

A. Well, I don't remember the price of those. It probably was in the neighborhood of four thousand, I don't——(interrupted)

Q. All right. Now, what else did you buy?

A. Well, I bought Sterling.

Q. What did you pay for the Sterling?

A. Well, it was probably close to eighteen hundred dollars.

Q. And what else did you buy?

A. Well, one thing was an Exercycle, and I bought a lace cloth, and——(interrupted)

Q. What did this exerciser cost?

A. Three hundred and twenty-five, or three fifty.

Q. What did this lace cloth that you just mentioned——(interrupted)

(Testimony of Dora F. Royce.)

A. Well, it was in the neighborhood of four hundred dollars.

Q. All right, what else did you buy?

A. Well, I bought Government bonds.

Q. How much worth? [319]

A. I think probably around seven thousand dollars' worth.

Q. What else did you buy?

A. Just trying to think—stocks—I don't know as I can think of anything right now.

Q. Any railroad securities?

A. Well, yes, that was Missouri-Pacific.

Q. Can you remember how much?

A. Well, in the neighborhood of twenty-five hundred dollars, I believe that was.

Q. And did you have any improvements made at your own expense at your home?

A. Yes, I did.

Q. Who drew the plans for them?

A. I drew a rough sketch of it, and then submitted it to the architect.

Q. You designed this personally?

A. Yes, I did.

Q. All right, what was the cost of that work?

A. Well, that was between fifteen and eighteen thousand dollars.

Q. Did you buy any other furniture that is out of the ordinary?

A. Well, yes, oh, yes. There were quite a number of things that I got. I don't know as I can enumerate them right now.

(Testimony of Dora F. Royce.)

Q. Did you buy a fur coat?

A. Yes, I bought fur coats.

Q. What did you pay for them? [320]

A. Well, one was a thousand dollars; I believe the other one was eight fifty.

Q. A thousand and eight fifty? A. Yes.

Q. Two of them? A. That's right.

Q. Out of your own earnings, did you pay your own income taxes? A. That's right.

Q. Now, who provided for the ordinary household expenses, such as groceries, and heat and lights and water, and things like that?

A. Oh, Mr. Royce.

Q. You didn't spend your money for that?

A. No; no.

Q. Now, there are some documents in evidence here. I want to particularly look at this waiver—notice—minutes—it is 25. I should like to see 25 and 26, please? Twenty-four, 25 and 26, I should like to see. (Exhibits handed.) Do you recognize your signature—photograph of your signature on this photostat, Exhibit number 24?

A. Yes, I do.

Q. You signed that, and were at the meeting, were you, where this was dissolved?

A. That's correct, yes.

Q. Now, I am handing you Exhibit number 25, and ask you to look at the signatures on that. (Exhibit handed.) Your signature on this [321] Exhibit? A. That's right.

Q. This is the partnership agreement?

(Testimony of Dora F. Royce.)

A. That's right.

Q. And under this partnership agreement, you have, at all times, been a partner since it was—
(interrupted) A. That's right.

Q. —made? I want to also show you Exhibit 27. The original of this certificate—assumed business name certificate—does that bear your signature? A. Yes, it does.

Q. And you signed it, you remember that?

A. That's right.

Q. And you have always—and all the other partners have held you out to the public as one of the partners? A. That's right.

Q. Now, was there any kind of a condition attached, or any strings attached to this gift of stock to you? A. No, there was not.

Q. When you went into that partnership, you intended to go in there as a real and true partner, and to do your portion and share?

A. That's correct.

Q. Now, Mrs. Royce, how long do you keep your records?

A. Well, not any further back than six years. That is what I have always been in the habit of doing. [322]

Q. How much? A. Six years.

Q. Six years. Since you met me, I have told you to keep them longer than that, haven't I?

A. That's right.

Q. Well, now, I am going to hand you here, Exhibit 22.

(Testimony of Dora F. Royce.)

The Clerk: You have it.

Q. Well, Mr. Royce has it. Where did you keep your personal bank account, Mrs. Royce?

A. The Sixth Street Branch, First National Bank.

Q. Now, for the years 1944 through 1947, do you have either your cancelled checks or bank statements?

A. No, I do not.

Q. I am handing you—first, I want to ask you, Mr. Picco, I had the bank photostat these things. Do you wish me to call a banker to identify them?

Mr. Picco: Do you know that these are all of the deposits and bank statements?

Mr. Jones: I will ask her.

Q. (By Mr. Jones): You kept your bank account at the Sixth and Morrison Branch of the First National?

A. That's correct.

Q. And were you—did you draw on that account at any time for whatever you wanted?

A. Oh, yes. [323]

Q. No one influenced you in what you spent the money for, or how you spent it?

A. No.

Mr. Picco: That will be all right. We will stipulate to that so you won't have to bring anyone in.

Mr. Jones: I offer Exhibit 22 in evidence.

The Court: It will be received.

(Petitioner's Exhibit 22, witness D. Royce, received in evidence.)

Q. Now, when these distributions of the partnership were made, did they come to you?

A. Yes.

(Testimony of Dora F. Royce.)

Q. And you did with them as you pleased?

A. That's right.

Q. Now, in your—in your home, did you have—or in your home, in the office, or anybody else's home, Mr. B. Royce's home, or anywhere, did you have business conferences with the partners concerning the affairs of Yellow Cab? A. Yes.

Q. Did you take part? A. That's right, yes.

Q. Take part in the discussions?

A. That's right.

Q. Did you attempt to keep yourself informed of the affairs of the corporation, so that you could contribute? [324] A. That's right, yes.

Q. Now, I am going to mix in—no, I will keep Seattle out of it. Now then, in the uniform—in the uniform checking that you did, did you watch that as well as the other things—the uniform of the drivers? A. Oh, yes.

Q. Now, what was this issue that came up over whether there would be women drivers?

A. Well, I wasn't in favor of women drivers.

Q. You were what?

A. I was not in favor of the women drivers.

Q. You got out-voted on that one? A. Yes.

Q. And then, besides policing uniforms generally—they were added to your supervision?

A. Yes.

Q. Did you have a joint checking account with your husband? A. No.

Q. Now, I am going to the Seattle Yellow Cab Company, and for a moment, before I talk about

(Testimony of Dora F. Royce.)

your interest in it, I am going to talk about this trust. Were you present at any time, at any place, where your daughter Eunice was first informed of the trust? A. Yes, I was.

Q. Where was that?

A. Well, it was in our home. [325]

Q. In what room? A. In the kitchen.

Q. And how old was she then?

A. I believe eighteen.

Q. And when did she graduate from high school? When was she graduated from high school? A. '51, I believe that was.

Q. What's that? A. Oh, from high school?

Q. High school?

A. I don't know as I can give you—I don't remember the year.

Q. Do you know how old she was?

A. Seventeen or eighteen.

Q. All right. And then where did she go?

A. After high school?

Q. Yes. A. What school?

Q. Yes. A. University of Oregon.

Q. And she was there from when to when?

A. Well, she was there until '51.

Q. All right. Now then, during the time that she was in college, do you know anything about what took place between Mr. Royce, Mr. E. Royce, as trustee of her trust fund, with respect to putting money [326] into her private bank account?

A. Well, I know that he put money in to her bank account, yes.

(Testimony of Dora F. Royce.)

Q. But you don't know the details of——(interrupted) A. No, I don't.

Q. All right. Do you know whether she had a private bank account of her own?

A. Yes, she did.

Q. Where did she keep it?

A. The Sixth Street Branch of the First National Bank.

Q. And that is a smaller account in her own name? A. Yes.

Q. In which funds were deposited from time to time? A. That's right.

Q. Now, then, coming back to this Seattle partnership, as far as you were concerned, I would like to see certificates—Exhibits 14 and 16—14 and 16 and 17 and 18, 19 and 19.

The Clerk: Eighteen, 19 and what?

Mr. Jones: That's all. Thank you very much. (Exhibits handed.)

Q. Now, did Mr. Royce give you any stock in Yellow Cab Company of Seattle, a Washington corporation? A. He did.

Q. And I am going to hand you here this Exhibit number 14, which is a photostat of several shares—I am turning to the last share in it, and ask you if you recognize that as a photostat of any [327] certificate you have seen before?

A. Yes.

Q. Of your shares? A. Yes.

(Testimony of Dora F. Royce.)

Q. And now, when this was given to you, were there any conditions of any kind attached to it?

A. No, there were not.

Q. It was given outright? A. That's right.

Q. As your own? A. That's right.

Q. To do with as you pleased?

A. That's right.

Q. Now, after that gift was made, Mrs. Royce, did you make and file a donee's gift tax return?

A. Yes.

Q. And I am handing you Exhibit number 16, and ask you if it bears your signature?

A. It does.

Q. Do you know when that gift was made to you? A. That was in 1944.

Q. What month?

A. I believe it was January.

Q. Now, then, there is a certificate of stock—the certificate of stock that you looked at, bears a date of April the 20th, 1944, do [328] you know why there is any difference—or lapse of time between the January shown on the gift tax return and the date on the stock certificate?

A. Do I know why that—(interrupted)

Q. Do you know how it happened—to be that lapse of time? A. No; no, I don't. No.

Q. And whenever you speak, always feel you are addressing the Court. Not me. Now, were you at Seattle when the old corporation was dissolved and the partnership was organized? A. Yes.

Q. And I am going to hand you here—there

(Testimony of Dora F. Royce.)

must be a stock tender in here. Number 17, I don't see it. Oh, yes. Here is a tender of shares for liquidation. Does this bear your signature?

A. Yes, it does.

Q. Thank you. And this all was done at the meeting in Seattle, at the liquidation? A. Yes.

Q. And then here is an Exhibit 18, and I refer you to the last page, and ask you if your signature is on 18? A. Yes, it is.

Q. All right, when you signed that, did you go into this business with the intention of being a full and bona fide partner? A. I did.

Q. Has that been your intention all the time?

A. That's right. [329]

Q. Were there any agreements or understandings of any kind between you and Mr. Royce, that you weren't a bona fide partner, either in Portland or Seattle partnerships?

A. Would you state that again?

Q. Yes. Was there ever at any time, an understanding between you that you wouldn't be such a partner? A. No; no.

Q. And you are such a partner?

A. That's right.

Q. Now, have you ever held conferences with respect to the business affairs of the Seattle company?

A. I have gone up there on numerous trips, and talked with Mr. Wenck in his office, yes.

Q. About the company's affairs? A. Yes.

Q. Have you ever performed any services in

(Testimony of Dora F. Royce.)

Seattle, similar to those you performed in Portland? A. Similar but not to the extent.

Q. But you had performed some?

A. In Seattle.

Q. Mr. Wenck is the Manager there?

A. That's right.

Q. And does your husband go up and devote the time there that he does here?

A. Devote the time that he does here? [330]

Q. Yes. A. No.

Q. Now, these things that you have purchased out of your own funds, did the money come all from one partnership, or from both, or what?

A. From both.

Q. And did you have the same control over the disposition of your Seattle drawings as from the Portland drawings? A. Yes.

Q. Did you go into each of these partnerships of your own free will? A. I did.

Q. Now, as far as that trust to Eunice is concerned, is that a—was that a bona fide out and out gift to her only? A. Yes, it was.

Q. And a bona fide existing trust, where your husband has no interest in it? A. That's right.

Q. It's her money and her interest?

A. It is to be hers.

Q. Now, then, did Mr. Royce ever invest any of your funds for you? A. Yes.

Q. Was that with your —was that with your authority? A. Oh, absolutely. [331]

Q. Did you talk the things over first?

(Testimony of Dora F. Royce.)

A. Yes.

Q. Now, have you ever been to the Aldergold Copper Mines? A. Many times.

Q. And were any of your funds invested there?

A. Yes.

Q. Was that with your consent? A. Yes.

Q. Was that talked over with you before you did it? A. That's right.

Q. And was that at your direction and desire?

A. It was my wish, yes.

Mr. Jones: You may cross-examine.

Cross Examination

Q. (By Mr. Picco): Mrs. Royce, do you consider the services that you rendered the Yellow Cab Company of Portland as being material—significant?

A. Well, I do, because services is what we give, and if the services are good, why, it would make quite a difference in our operation.

Q. In comparing your services with the nature of the services which Mr. Royce rendered, how would you do it? His services are considerably more vital to the operation of the business, was it?

A. Well, it probably was more so, but then, I feel that my services are very important to the company too. [332]

Q. Then did your services require your walking up and walking down the street, primarily, and walking—watching out for Yellow Cabs?

A. Not walking up and down. Generally, it

(Testimony of Dora F. Royce.)

would be at the hotels, or the depot, or any place where cabs came in frequently, picked up loads, or discharged passengers.

Q. These services weren't rendered around the shop or office at all? A. No; no.

Q. Actually, the services could very well have been rendered while you were making a tour downtown, buying a fur coat, or something like that, is that right? A. Not necessarily.

Q. It could have been done during that period of time?

A. Well—it—no, but I devoted a lot more time than that.

Q. Now, in—you say that you attended the conferences. Will you go into that just a little more explicitly? What conferences are you referring to? A. You mean——(interrupted)

Q. We are talking about Yellow Cab?

A. In Portland?

Q. Portland.

A. You mean the conferences that we had, among the four of us? It was generally in our home, when the four of us got together, yes. [333]

Q. Usually after the evening meal, or something like that?

A. Not necessarily. We planned to get together for that reason.

Mr. Jones: Speak a little louder, please, Mrs. Royce.

Q. I take it you are referring to conferences with your husband? A. No.

(Testimony of Dora F. Royce.)

Q. You mean that the conferences of the Yellow Cab Company, Portland, were held in your home?

A. With the four—yes, four of us would very often get together and discuss the business.

Q. Would you give the Court an illustration of some of the decisions that were made at these conferences?

A. I don't know as I remember them offhand.

Mr. Jones: Wait just a minute. All right.

A. I don't know as I remember them offhand, just what took place.

Mr. Jones: Mrs. Royce, I can't hear you.

Q. Would you just state that again, so the Judge can hear you?

The Court: Somebody close those windows back there.

Q. You understood my question, did you not? I asked you to give the Court an illustration of some of the conferences that were held and some of the decisions that were made at those conferences at your home?

A. You just an illustration of what I—I don't know as I can remember what those were at this time.

Q. Now, you mentioned that you had two New Yorkers, what are [334] those, are those—what model automobile is that? Is that a Chrysler?

A. Chrysler, I guess.

Q. Do you remember when you had those?

A. I don't remember the exact years, no.

(Testimony of Dora F. Royce.)

Q. You don't know whether you got them during the years——(interrupted)

A. It was during around '45, '44.

Q. How about, you mentioned you had a Cadillac, too? A. Yes.

Q. Are you talking about the family car?

A. No, that's my own car.

Q. That's separate, and owned——(interrupted)

A. Yes.

Q. ——separately by you? Or is it a joint account—or joint title. How was title taken of these automobiles?

A. I don't remember. Some of them were in my title, and I think maybe some were Mr. Royce's—they were definitely my cars.

Q. As a matter of fact, they might have been jointly held by you and Mr. Royce?

A. Well, they were definitely my cars.

Q. Well, you said you had some stocks and bonds? A. That's right.

Q. Did you have very many? [335]

A. Well, I had the Missouri-Pacific, and then I had——(interrupted)

Q. And do you know how many shares you held of those stocks, or——(interrupted)

A. I don't remember the number of shares, no.

Q. In fact, did you have any after 1946—or did you have them before—when did you own the securities?

A. I thought it was around '44 or '45—I don't remember the exact years.

(Testimony of Dora F. Royce.)

Q. Do you know whether you had them after 1945? A. I think it was 1946.

Q. And did you get rid of them right away?

A. Right away? No.

Q. Did you have them in '47 and '48?

A. I wouldn't be able to say, unless I had something to check by.

Q. You are not sure whether you had the securities, or any securities at all during the tax years?

A. Yes, I did; yes, I did.

Q. If you did, you would have reported interest or dividends on those, would you not? A. Yes.

Q. And if you hadn't reported the dividends or interest on those returns—on the returns, then you would conclude from that, wouldn't you, that you didn't have them?

A. At that particular time? [336]

Q. Yes.

A. Well, of course, as I say, I don't remember just the exact years.

Mr. Picco: Will you give me Petitioner's Exhibit 40? (Exhibit handed.)

Q. Now, I hand you Petitioner's Exhibit 40, which comprise a number of checks paid by Yellow Cab, endorsed by E. Royce to yourself, payable Dora F. Royce. Do you know about these checks? A. Yes.

Q. Now, these are the checks that went—part of the checks or all of the checks that went into your separate bank account?

A. I don't—they all went in there.

(Testimony of Dora F. Royce.)

Q. You are not sure they did, are you? Did you say yes or no to that question?

A. I don't know just where—whether I deposited them in my account, or whether I cashed them.

Q. Would you know by looking at the—at the reverse side of the check, whether you cashed them, or whether you put them into the bank account?

A. Whether I cashed them or put them in the——(interrupted)

Q. Bank account?

A. Well, probably I would.

Q. You want to look at those? Isn't it true that you endorsed a good many of those checks—principal number over to your husband? [337]

A. No, I—only where it was—where I was reimbursing him for something that he had paid out for me.

Q. Oh, I see.

The Court: Would you repeat that statement, please?

Q. Will you repeat that statement?

A. Reimburse him for something that he had paid out for me.

Q. Now, here is a check dated 8/25/1945—it is number seventeen eight fifty-five, and that is made out to you, in the sum of eleven thousand five hundred and thirty dollars. Now, you endorsed this over in blank to your husband, Mr. Royce. Was that a reimbursement?

(Testimony of Dora F. Royce.)

A. It could have been, or it might have been a—a deposit I made for—in my safety box.

Q. You were putting money in your safety deposit box? A. Yes.

Q. When would you do that?

A. When would I do it? When I cashed the check.

Q. You mean, you didn't leave the money in the checking—in the savings account? You would take the money out of the savings account to put in your safe deposit box, is that what you mean?

A. No, it wasn't in the savings account.

Q. Well, this—what would you do with it then? This is your check. Please explain it to the Court in your own way?

A. Well, of course, I don't remember the particular check.

Q. Well, it is a check like it—it gives you an idea what you [338] did with it, isn't that right?

A. Well, I cashed it and placed the money in the—in my—in the safe.

Q. Well, this check, Mrs. Royce, was turned over to Mr. Royce?

A. Well, I think probably that oftentimes, they required his signature too, to get the cash at the bank.

Q. I see. Here is another one—August 4, 1945, number eighteen one forty-three, and did you do the same with that?

A. Yes, a good many—number of them.

The Court: You will have to speak louder.

(Testimony of Dora F. Royce.)

A. There was a good number of them.

The Court: Keep your face turned to the front.

Q. This was eleven thousand five hundred and thirty dollars? You did the same thing with that check, so far as you know?

A. Yes, as far as I know; yes.

Q. And the next check, September 14, 1945, in the same amount, eleven thousand five hundred and thirty dollars? You think that went into the safe deposit box? A. I think so.

Q. Here's December 28, 1945—the same type of a check, and it's number eighteen seven nine three, again, eleven thousand five hundred and thirty. You think that is the explanation for it?

A. I—yes.

Q. And all of these that were endorsed over in blank to Mr. [339] Royce found their way into the safe deposit box? A. That's right.

Q. Now, here is one for four thousand six hundred and twelve dollars, September 7—15, 1945, would you say the same as to that? It's endorsed in blank——(interrupted)

A. Yes, I imagine that is what it was.

Q. Now, all of these checks that were endorsed in blank to Mr. Ezra Royce, you think got into the safe deposit box? A. Yes.

Q. You didn't put them in your savings account? A. No.

The Court: Do you have any recollection of how much total amount you had——(interrupted)

A. No, I don't. I don't remember that.

(Testimony of Dora F. Royce.)

The Court: Just a moment. The total amount you had in your safety deposit box at any one time?

A. Well, it was a considerable amount.

The Court: That is an indefinite term.

A. Well, around sixty-five thousand, something like that.

Q. You are saying now that you had sixty-five thousand dollars in case in a safe deposit box?

A. Around that. I don't remember the exact——(unfinished answer)

Q. Is that different from what you stated on direct examination? I had the impression, from listening to you that you had it in a [340] savings account, or that it was invested, or loaned to Mr. Royce?

A. That I had it in a savings account?

Q. Either that, or paid for taxes, or invested in notes of your husband, or in that gold mine?

A. A great deal of it I turned over to him for investment, yes.

Q. You mean from the safe deposit box?

A. Yes.

Q. What did you say on that—what was the amount of that?

A. I don't remember the amount of that.

Q. Now, on those checks that were endorsed in blank to your husband, was it necessary to have him put that in a safe deposit box and then remove it from the safe deposit box? A. Yes.

(Testimony of Dora F. Royce.)

Q. Now, you say you know quite a bit about the Aldergold Copper Mine?

A. Yes, I have been up there a good many times.

Q. Where is it?

A. It's up at Twisp, Washington.

Q. Do you know anything about the operation of the mine, if any?

Mr. Jones: Louder, Mrs. Royce, or the Judge won't hear it.

A. About the operation? You mean whether it has been in operation? Yes. And I have——
(interrupted) [341]

* * * * *

A. What was your question?

Q. I asked you whether you knew anything about the operation of the mine?

A. Well, I know that it was operating.

Q. That's the—the information you know about the mine is what you got from your husband, isn't it?

A. Not necessarily. I heard the different ones discuss the operation of the mine, and I have——
(interrupted)

Q. And it—I'm sorry.

A. I was very interested in the mill—I went all through the mill, and it was huge.

Q. Your husband was very much interested in that company, wasn't he?

A. I don't know—I don't know as I understand your question.

Q. Was he interested in that company?

(Testimony of Dora F. Royce.)

A. Yes, he was interested.

Q. He promoted the sale of stock in that company, didn't he? A. I don't know about that.

Q. Do you know about his activity in connection with the mine, [342] or with that company, the Aldergold Copper Company?

A. His connections?

Q. His connection or his activity concerning that company? A. No, I don't know that.

Q. Isn't it true that the principal part of that money went into ventures that your husband was interested in?

A. It went into—it—I was very much interested to put money into the mine, and authorized him to put my money into it.

Q. Now, you loaned the money to your husband to put into the mine, did you not?

A. That's right.

Q. Did he give you a note for that?

A. No, I haven't a note for it.

Q. It wasn't necessary to have notes between you and your husband, I take it? I mean, as husband and wife, you had confidence in each other, is that right?

A. I certainly did have confidence in him.

Q. If he asked you for any money, why, you were glad to give it to him?

A. On a loan, you mean?

Q. Yes. A. Yes.

Q. You never did question his authority—not authority—you never did question any suggestion

(Testimony of Dora F. Royce.)

he might have about putting money in some of the stock that he might be interested in, or some of these [343] ventures he may be interested in, or might have been?

A. Will you state that question again, please?

Q. You saw no reason to doubt him when he made any statement about how desirable it would be to loan him some money for the purpose of putting it into a venture of his? I mean, you would loan him the money at the mere suggestion that he needed it?

A. Well, no; no.

Q. What would you do?

A. Well, first, I would talk it over with him, and if I felt that it was a good thing, why, then I left it up to him to invest my money.

Q. He was able to convince you most times that what he was interested in was a good thing, is that true?

A. Well, not necessarily.

Q. Was there any time you remember that you didn't give him money when he asked you?

A. Well, I can't think of any—of an instance now.

Q. Now, you mentioned that Eunice wasn't told about the trust until she was eighteen?

A. That's right.

Q. That was when she started going to college?

A. Just about that time, yes.

Q. And then you knew that some small amounts were made available by your husband, into her—into her savings account, is that correct? [344]

A. Will you state that again?

(Testimony of Dora F. Royce.)

Q. That isn't too clear. You knew about amounts that were put by Mr. Royce, into her savings account, while she was going to school?

A. Yes. It wasn't the savings account, though.

Q. It was a checking account?

A. Checking account.

Q. They were small amounts, for purposes of expense, isn't that correct?

A. That's right; that's right.

Q. As far as you know, that is the only amount of money that was made available, that way, for Eunice?

A. Well, so far as I know.

Mr. Picco: That's all, your Honor.

Mr. Jones: Just a moment, Mrs. Royce.

Redirect Examination

Q. (By Mr. Jones): Your own income taxes, were they paid out of your—your distribution—
(interrupted)

A. That's right, yes.

Q. —your drawings? Now, out of some of these checks that bear the endorsement of Mr. Royce—that bear the endorsement of Mr. Royce, was any of this the money that went to the Aldergold Copper?

A. I don't know as I understand your question.

Q. Do you know whether any of this money got into Aldergold Copper?

A. These—these checks?

Q. Well, I guess—do you know whether any of this happened to go to Aldergold Copper or not, would you know definitely?

(Testimony of Dora F. Royce.)

A. No, I wouldn't.

Q. Now, as a parent, did you see any necessity or any reason why you should tell a child below eighteen years old that they had a considerable amount of money?

A. No, I certainly did not. I didn't think that she would understand just what was being done for her at that time.

Q. Did you think it would be good for her to know about it? A. No.

* * * * *

EUNICE ROYCE DODGE

a witness called on behalf of the Petitioners, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record?

The Witness: Eunice Royce Dodge, 38 Martin Place, Wenatchee, Washington.

Mr. Jones: I mis-called your name. I realize it's Mrs. [346] Dodge.

The Clerk: Dodge—D-o-d-g-e?

The Court: What is your married name?

The Witness: Dodge.

Direct Examination

Q. (By Mr. Jones): You went to the University of Oregon between '47 and '51, is that right?

A. That's right.

Q. What year did you become eighteen?

A. It was '47.

Q. What year did you graduate from high school? A. '47.

(Testimony of Eunice Royce Dodge.)

Q. And when did you first learn that there existed for you, a trust interest in this Seattle partnership of Yellow Cab Company?

A. I think I was about eighteen.

Q. And where, and under what circumstances did you first find out?

A. Well, it was at home.

Q. Who was present?

A. Well, my mother and father.

Q. And they told you about it? A. Yes.

Q. And what room did that take place in?

A. In the kitchen. [347]

Q. You recall the incident? A. Yes, I do.

Q. Now, you are—how long have you been married? A. Almost a year, June 12th, 1954.

Q. And at any time since you found out about the existence of this trust, had you ever heard any statement or suggestion from any source that that wasn't yours out and out bona fide yours as a beneficiary? A. No, I didn't.

Q. You regarded and understand it to be yours?

A. Yes.

Q. Had you ever made any—let's see—you were in college in '49, weren't you?

A. Yes, I was.

Q. And were you in college in '48?

A. Yes.

Q. And sums then were being taken from this source and put into your Portland bank account?

A. That's right.

Q. Where was that bank account?

(Testimony of Eunice Royce Dodge.)

A. At the First National.

Q. And you drew on that as you pleased?

A. Yes.

Q. Now, had you always regarded yourself as holding a substantial interest in this Seattle Taxicab Company? [348]

A. Since I found out about it, yes.

Q. Yes, and there has nothing ever happened in any way to cause you to doubt the reality—the validity of the deal? A. No.

Q. Now, when—that's all, you may cross examine.

Cross Examination

Q. (By Mr. Picco): Mrs. Dodge, is that the name? A. That's right.

Q. Do you know anything about the Yellow Cab partnership in Seattle?

A. Do I know anything about it? You mean how it operates, or?

Q. The operations of it, the capital structure of it? A. No.

Q. Do you know anything about the books?

A. No, not very much.

Q. You feel a little remote from that partnership completely, is that right?

A. Well, I haven't taken an active part in it.

Q. You don't know how much money it's making, or anything like that? A. No. I don't.

Q. You don't know anything about the returns that were made for you? [349]

(Testimony of Eunice Royce Dodge.)

A. The returns that were made for me? No.

Q. Do you know whether any returns were ever made for you?

The Court: Tax returns.

Q. Tax returns?

A. Tax returns, oh, yes, I signed quite a few of them.

Q. You signed the returns? A. Yes.

Q. When did you sign them?

A. Well, that is when I found out about it, when I had to start signing them after I was eighteen.

Q. This was in 1947? A. Yes.

Mr. Picco: May I have Exhibits double-U and triple-V?

The Clerk: V?

Mr. Picco: Double-U and triple-V. (Exhibits handed.)

The Clerk: You have got Z there. Here is Y.

Q. Now, here is the amended return for 1947, Respondent's Exhibit ZZ, did you sign that one?

A. No, that was by my father.

Q. All right. Of course, the original was signed by your father too, wasn't it? That is YY? Now, before 1947, obviously, you didn't sign any of those, did you? A. No, I didn't.

Q. And '47, you didn't sign them. Now, here is 48, which is Respondent's Exhibit triple-A, you didn't sign that either, did you, Mrs. [350] Dodge?

A. No, it doesn't have my signature on it.

(Testimony of Eunice Royce Dodge.)

Q. And the same for the year 1949, Respondent's Exhibit triple-V? A. No.

Q. You were mistaken about signing those, weren't you?

A. I signed many of them. I don't know whether—— (interrupted)

Q. You mean you signed the tax—tax returns involving this trust, and the money in the trust?

A. Yes.

Q. Do you know whether any trust tax returns were filed? A. Whether any were filed?

Q. Yes, whether any were ever filed?

A. Yes.

Q. You think they were? Were those the tax—trust tax returns that you were looking at? You wouldn't really know if you saw them that it was a trust return, would you, Mrs. Dodge?

A. Well, if I read it, I would.

Q. Do you know actually, of your own knowledge, that some trust tax returns were filed?

A. Well, that's what I thought they were, yes.

Q. From the years 1944 through 1949?

A. I don't know about 1944.

Q. Do you know about the other years? [351]

A. For about '48 or '49. I don't know about the earlier ones.

Q. Did you ever see the trust instrument?

A. Did I? No.

Q. You don't know anything about it, do you?

A. Well, I—I have had it explained to me, but I have never seen it.

(Testimony of Eunice Royce Dodge.)

Q. Who explained it to you?

A. My father.

Q. Did he—did your father ever make any accounting to you, as to the funds received from the Yellow Cab?

A. As to the amounts?

Q. Yes. A. No.

Q. Have you ever asked him what your share was?

A. Yes, I did.

Q. For what year?

A. You mean my share in the company, or—
(interrupted)

Q. No, the share of the earnings from the partnership?

A. No, I didn't.

Q. You were letting that all off to your Dad, weren't you?

A. Yes.

Q. He has never made any report to you about the trust? About the funds of the trust?

A. Nothing particular.

Q. You don't know what he has been doing with the funds, do you, [352] if anything?

A. I know he has been loaning them.

Q. Loaning the funds—you mean he has been taking money for loaning to himself for use in some of his business?

A. Not in his businesses, no.

Q. In what business?

A. Well, I think one was the Aldergold Copper Company.

Q. Did he borrow some of the trust money for that purpose too?

A. I think so, yes.

Q. Do you know how much?

(Testimony of Eunice Royce Dodge.)

A. No, I don't.

Q. Did he ask your consent about that at all?

A. Yes, he did.

Q. He thought that it was necessary to do that?

A. Yes.

Q. Now, what would he show as evidence of these loans to you, or were you interested in knowing?

A. I wasn't interested in knowing.

Q. Anything he would have done would have been all right with you, is that right?

A. Well, yes, I trusted him, if that's what you mean.

Q. You don't know anything about notes he might have executed?

A. Any notes?

Q. Yes, in your favor? [353]

A. Well, I believe he did give notes, for the loans.

Q. You don't know though, actually?

A. Not definitely, no.

Q. And you have had no interest in finding out, have you?

A. No.

Mr. Picco: I have no other questions, your Honor.

Mr. Jones: I have one.

Redirect Examination

Q. (By Mr. Jones): You are sure you signed tax returns?

A. Yes, I am.

Q. All right. Now, whether you had—whether that was just for the portions of the trust that you personally received, along with the earnings that you made—you worked somewhere, didn't you?

(Testimony of Eunice Royce Dodge.)

A. Yes, I did.

Q. Where did you work?

A. The Imperial Travel Bureau.

Q. And you worked there from when to when?

A. That was in March of '52 to March of '54.

Q. And you know that you signed tax returns for something? A. Yes.

Q. But could you be confused as to just exactly what the tax returns were?

A. Yes, that could be.

Q. Did you ever sign waivers, or anything like that, or do you [354] know exactly what— (interrupted)

A. Not that I know of, no.

Q. But whatever intending—they had you report it and sign the returns for? A. Yes.

Mr. Jones: Okay.

Recross Examination

Q. (By Mr. Picco): Do you know of any amount that you did receive from the trust?

A. Any amount that I received? Well, yes, when I was in college, I got about two hundred dollars a month.

Q. Actually, you don't know the status of the trust at all, do you? The funds—you don't know the status of it all?

A. You mean the amount of it?

Q. The amount, status of it?

A. No, I don't.

Q. During the years 1944 to 1949, where you— (interrupted) A. No. [355]

* * * * *

B. ROYCE

a witness called on behalf of the Petitioners, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record? [357]

The Witness: B. Royce. R-o-y-c-e.

Direct Examination

Q. (By Mr. Jones): Mr. Royce, where do you reside? A. In Santa Barbara.

Q. You formerly resided where?

A. Vancouver, Washington.

Q. Where did you reside in 1945?

A. Vancouver, Washington.

Q. What was your occupation in 1945?

A. In the taxicab and—— (interrupted)

Q. And what else—— (interrupted)

A. And I had a farm over there—a dairy farm.

Q. And how much time did you devote to the supervision of your farm?

A. Quite a bit of the time there in those years. The help situation—the turn-over was very heavy, and I put in a lot of time at the farm.

Q. In '45? A. That's correct.

Q. Now, then, in 1945, did you make an investment in the stock of Oregon Motor Stages?

A. I did.

Q. And how much did you invest, sir?

A. Fifty thousand dollars. [358]

Q. Was that your own money? A. It was.

Q. And was that for your own interest and your own benefit? A. That is correct.

(Testimony of B. Royce.)

Q. Did you have any interest in the investment made by Mr. Bentson? A. I did not.

Q. Did you have any interest whatever in the investment made by Mr. E. Royce?

A. I did not.

Q. When Mr. Bentson turned in his stock, and it was paid for by the corporation and cancelled, did you get any gain from it? A. I did not.

Q. Were you intended to get any gain from it?

A. No.

Q. Were there any contracts of any kind that you would have any interest in that, or any gain from it? A. There was not.

Q. Or that you had any interest in the stock of any of the other purchasers of the Oregon Motor Stages stock? A. None whatsoever.

Q. Now, your wife, during the years '42 through '49, was Isabelle Royce, is that correct?

A. Yes.

Q. And was she one of the partners in the Oregon Yellow—in [359] the Yellow Taxicab Company, the Portland partnership?

A. She was.

Q. And was she—was her interest as a partner ever challenged? A. Never.

Q. Do you—were you present when the Seattle and the Portland corporations that preceded the Seattle and the Portland cab partnerships were dissolved? A. I was.

Q. One meeting took place, I believe in Portland in '42, and the other in Seattle in '44?

(Testimony of B. Royce.)

A. That's right.

Q. Was Mrs. Dora F. Royce there?

A. She was.

Q. And your wife? A. Right.

Q. And the partners in those two companies—
what—had they always recognized Mrs. Dora Royce
as a partner? A. That's right.

Q. Was she intended to be a partner?

A. She was.

Q. Now, did you ever take in any money yourself personally in 1947—I am on the taxicab issue. I will have to wait for this question, your Honor. Strike the last, please—the last question. Do you know whether or not Dora Royce ever performed any services [360] on behalf of the Portland Taxicab partnership? A. Yes.

Q. And what was the nature of her services?

A. Well, both Dora and Isabelle they done a lot of checking in different places, when they was in stores, and driving along the streets, and the like of that, and—— (interrupted)

The Court: A little louder, please.

A. The condition of the drivers, and the number of passengers they had in the cabs, and if the cab looked clean, and so on and so forth; and when they were driving, so see if the driver was driving—doing things that he shouldn't do—they would make out a slip and turn it in and check them out.

Q. And did you have conferences between yourself and the other three partners in this company?

A. Yes.

(Testimony of B. Royce.)

Q. And did the women take part in them?

A. They did.

Q. And take part in the decisions that were made?

A. That is correct.

Q. When did you arrive in Portland, Mr. Royce—on this trip here?

A. I came in last night.

Mr. Jones: And you may cross examine. Just a moment please.

Q. (By Mr. Jones): Oh, Mr. Royce, did you buy an interest in [361] the—Hippodrome Amusement? Are you interested in the Hippodrome Amusement Company?

A. I am.

Q. And do you know whether or not it had any plans for the improvement, building upon its Seaside properties?

A. Yes, we—we built some buildings there, and—— (interrupted)

Q. Have you been negotiating for others at any time?

A. Yes, we have had some prospects on—we had one here a while back that fell through. We were about ready to go ahead. The plans were out and everything, but that deal fell through.

Q. Now, do you know whether or not—there is testimony in this case that twenty thousand dollars has been drawn from the company—has been paid by the company to Mr. E. Royce. Do you know the circumstances under which he—— (interrupted)

A. That was not paid to him, it was loaned to him, until the company, or the Directors decided

(Testimony of B. Royce.)

that it should go back into the company, and at that time, he'd pay it back.

Q. That was the understanding at the time?

A. That is correct.

Q. Has it ever been forgiven to him?

A. Never.

Q. And you still expected—you still expect it to be paid back?

A. Absolutely. [362]

Mr. Jones: You may cross examine.

Cross Examination

Q. (By Mr. Picco): Mr. Royce, do you know about the negotiations for the purchase of the Oregon Motor Stages stock?

A. Just what angle are you talking about now? I don't— (interrupted)

Q. About the negotiations, do you know anything about that, or were you on the sidelines on it?

A. I was on the sidelines on that.

Q. You were on the sidelines too, as far as negotiations for the loan from American Business Credit Corporation, weren't you?

A. I was, yes.

Q. Now, you state that you and your wife were living in Washington—the State of Washington?

A. That is correct.

Q. And you treated yourselves as a community—under the community property laws of the state, did you not?

A. That's right.

Q. Now, as far as the Hippodrome issue is concerned, the plans for improvement—can you tell me when those plans were conceived?

(Testimony of B. Royce.)

A. Those last ones I just mentioned?

Q. Yes.

A. Well, that was with the Postal Department in Seattle, they [363] were—oh, I think when he called me up first—I forget his name, down in Santa Barbara, and I told him that Roy was handling that, to get in touch with him up here, and then they got the plans out and everything, and the ground that they had figured on building it on, and then, for some reason or other, they decided to put it in another location, and we didn't get the deal.

Q. You had plans for the improvement of the building there, or for reconstruction of a building as early as 1945, didn't you? A. Yes.

* * * * *

E. ROYCE

a witness recalled by the Petitioners assumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Jones): Mr. Royce, during your examination, and I am not sure, but [364] I think both were on direct examination—there were statements made, which, as I checked over your testimony, seems to me to be a little confusing. At least, it is confusing to me, and I want to ask you about these two questions: At one time, in asking you about the gift of the shares of stock in the Portland partnership of Yellow Cab Company, the fourteen hundred shares to your wife, Dora F. Royce, your testimony was, and if I don't speak it exactly

(Testimony of E. Royce.)

verbatim, it is not because that I am trying to make any shading on it, it is just that I don't have the exact words in my mind, for I haven't asked the Reporter to look them up. But, they were to the effect that you intended her to become a partner; at another time, that the gift was made, as I recall the testimony, without strings. Now, which—I am confused by those two apparently conflicting statements. I wish you would explain that, please?

A. The gift was made without any condition whatever. It was an outright gift. I was in hopes that she would become a partner, but she was under no obligation to do so.

Q. Well, what if she hadn't have?

A. Well, the remaining partners would have then have to purchase her interest, or she could have sold to someone else, if it had been agreeable to the rest of the partners.

Mr. Jones: You may cross-examine.

Cross Examination

Q. (By Mr. Picco): You want that to constitute a change in your testimony of [365] yesterday?

A. I don't know if it is much of a change. Probably a little clarification.

Q. This clarification came after discussion with your attorneys after the—after yesterday's or Saturday's trial?

A. Well, he seemed to be confused on my answer, and wanted to clarify it.

* * * * *

DORA F. ROYCE

a witness recalled on behalf of the Petitioners, assumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Jones): Now, Exhibit 22, those bank statements that are in evidence show a considerable amount of money had been deposited in your bank account at the Sixth and Morrison Street Branch in Portland, Oregon, over the years '44—may I see 22, please? I believe it is for '47. (Exhibit handed) Yes, through the year '47. Where did that money come from that was deposited in that account?

A. From my earnings in the Yellow Cab Company.

Q. From the Cab Company? [366] A. Yes.

Q. Both Portland and Seattle?

A. That's right.

Q. Now, then, there was testimony on cross-examination that you would cash these checks, or at least a good many of them. Will you explain then, how the money, after you had cashed the checks, would get into this bank account?

A. Well, I would take it from my—from my safety box and place some of it in my account at the other bank.

Q. Now, did you ever cash checks and then put part of it into your purse, and at the same time put some in your bank account?

A. Yes, I did that at times, too.

Mr. Jones: You may cross-examine.

Mr. Picco: No questions, your Honor. [367]

* * * * *

FANNIE ORSEN

a witness called on behalf of the Respondent, first having been duly sworn, testified as follows: [433]

* * * * *

Direct Examination

Q. (By Mr. Picco): Mrs. Orsen, did you give your address, where you are living?

A. No. 616 S. E. 38th Avenue.

Q. And you are testifying here pursuant to a subpoena, aren't you? A. I am.

Q. Did you have occasion to meet L. R. Bentson during your lifetime? A. Yes.

Q. Did you know him well? A. Yes.

Q. Will you please state the circumstances?

A. Well, I lived with my aunt and uncle for about nine years.

The Court: I can't hear you. Face this way.

A. All right. I lived with them for about nine years, from 1909 to '18. [434]

Q. You were related to Mr. Bentson, weren't you? A. Yes, Mr. Bentson married my aunt.

Q. You are also related to Mr. Ezra and Barney Royce, aren't you?

A. Well, I wouldn't say that.

Q. You were very friendly to them?

A. I have know them for years.

Q. Now, you were very close to Mr. and Mrs. Bentson, I take it. Did you state in 1908—(interrupted) A. 1909.

(Testimony of Fannie Orsen.)

Q. 1909 to 1918? A. To 1918, yes.

Q. Did you live with him? A. Yes.

Q. Where was that? A. Vancouver, B. C.

Mr. Jones: I didn't hear your answer.

A. Vancouver, B. C.

Q. Have you kept in touch with Mr. Bentson during all these years?

A. Yes, he came down here—came down here to visit every once in a while.

Q. Would you—would he make very many visits to Portland?

A. Oh, about once a year, probably. Maybe not every year. [435]

Q. When would he come, normally? Or usually, if you know? A. Oh, that would vary.

Q. Would it be in the—what season of the year?

A. Well, in the—in the summer.

Q. Is Mr. Bentson still living? A. No.

Q. When did he die, do you know?

A. 1950, I think it was. April 1950.

Q. How old was he when he died?

A. Eighty-one.

Q. Did he leave an estate? A. Yes.

Q. How do you know?

A. I was the Executrix of the estate.

Q. Did you inherit some property from him too?

A. I did.

Q. Were there any other heirs? A. No.

Q. You were the sole heir? A. Yes. [436]

* * * * *

(Testimony of Fannie Orsen.)

Q. Now, you testified you were the sole heir of the estate, did you not? A. Yes.

Q. Did you receive thirty-three thousand, six hundred and seventy-three dollars and six cents from the estate? A. I did not.

Q. What did you receive?

A. Something like thirty thousand. Thirty thousand.

Mr. Picco: I move this into evidence.

A. After expenses. [439]

* * * * *

Q. (By Mr. Picco): Mrs. Orsen, you knew Mr. and Mrs. Bentson very well during the years 1908 to 1950, at the time of his [453] death?

A. 1909.

Q. 1909 to 1950. And you lived with them for ten to twelve years? A. Nine years.

Q. You knew their habits, did you not?

A. Well—(interrupted)

Q. Did they live expensively? A. No.

Q. Did they live a modest life?

A. They did.

Mr. Jones: Did they what?

Q. Live a modest life? What kind of a home did Mr. and Mrs. Bentson have?

A. They had about a twelve room home, I believe.

Q. When was that?

A. Well, that—I don't know when—I don't remember when they built it, but probably it was 1910 or 11, I am not positive.

(Testimony of Fannie Orsen.)

Q. And did he later—do you know whether that is the same home he lived in all the time?

A. No. They sold it later on.

Q. Well, when—when did he do that?

A. I don't remember the date.

Q. Now, what kind of home did he have then?

A. After he sold the other one?

Q. Was it a—(interrupted)

A. Small place.

Q. Now, on his visits to Portland, how long would he stay, normally, or usually?

A. You mean with me, or with the boys?

Q. Well, just when he would come to Portland?

A. Well, I couldn't say exactly.

Q. Would he stay—would you be able to say he stayed more than two or three days or a week?

A. Well, I think he would stay probably four or five days.

Q. Now, was it usual for him to visit you when he came? A. Yes.

Q. That would be—would it be unusual if he didn't visit you if he came to Portland?

A. Well, I think it would.

Q. Now, Mrs. Bentson, is she still living?

A. No.

Q. Did she die before Mr. Bentson?

A. Yes, sir.

Q. Do you know approximately what year?

A. I think '46, but I wouldn't be positive.

Q. Do you remember Mr. Bentson's visit to Portland in 1945?

(Testimony of Fannie Orsen.)

A. Well, I don't know—to remember each year he was [455] here that when he would come down. If he was here in '45 why, I probably—(interrupted)

Q. Do you have anything that might fix your mind on that, as to whether he was here in 1945?

A. Well, I think, as I remembered it, he called me up and said that he was in town, and he would be out to see me.

Q. This was in 1945?

A. I wouldn't say whether it was '45 or not.

Q. Do you—(interrupted)

A. I am not positive.

Q. How do you remember that he was in 1945—do you have something that gives you a remembrance of that? Did you see something in the paper, or something like that?

A. Oh, there was an article in the paper some time after he—weeks, I suppose, I don't know just when—(interrupted)

Q. Do you have that clipping with you?

A. I think it's in one of those.

Q. I wonder if you would spend a little time looking for it? (Documents handed)

A. Here it is.

Mr. Picco: Will you identify that—mark it?

The Clerk: Respondent's Exhibit four M's for identification.

(Respondent's Exhibit MMMM, witness Orsen, marked for identification.) [456]

(Testimony of Fannie Orsen.)

Q. I hand you Respondent's Exhibit four M's for identification, which purports to be a clipping concerning Oregon Motor Stages, and ask you whether that is your handwriting on that clipping?

A. Uh huh, yes; yes, sir.

Q. And what is that—that is the date that it was received?

A. Well, I suppose that was the date of the paper. I thought he would be interested in seeing his name in the paper (laughter)—send it to him.

Q. Did you take the clipping, and what did you do with this clipping? Did you send it to Mr.— (interrupted)

A. Oh, I sent it in a letter that I had written to him.

Q. Now, the date here is—what is that date on there? A. That is July the 12th.

Q. Would you say you sent it about that time?

A. I couldn't tell you; I just don't remember. It might have been weeks after; it might have been—I don't know—I don't remember.

Q. This does fix in your mind his visit to Portland in 1945? A. Yes.

Q. This is what you would use? A. Yes.
* * * * * [457]

Q. (By Mr. Picco): Do you know how long he was in Portland at that time?

A. No, I do not.

Mr. Picco: That's all, your Honor.

The Court: You may cross-examine.

Mr. Jones: Just a moment, please.

(Testimony of Fannie Orsen.)

Cross Examination

Q. (By Mr. Jones): Did Mrs. Schneider—Mrs. Bentson, I mean to say—did Mrs. Bentson die about 1947?

A. '46 or 7, I wouldn't be positive.

Q. Did she become afflicted before her death with throat cancer?

A. Well, I think she was troubled with it; she didn't know what it was, but she was troubled with it.

Q. You don't know of your own information what the difference in his financial worth between 1945 and 1950, at the time of his death might have been—what change there may have been in it, do you?

A. He never confided in me in anything in regards to his [460] financial affairs.

* * * * *

ROBERT D. AMOS

a witness called on behalf of the Respondent, first having been duly sworn, testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Picco): What do you do, Mr. Amos?

A. I am Chief of the Intelligence Division in the Internal Revenue Service at Helena.

The Court: Speak a little louder please, Mr. Amos.

A. At Helena, Montana. [461]

Q. How long have you been with the Internal Revenue Service?

(Testimony of Robert D. Amos.)

A. Since 1940, except that I was in the Navy from 1942 to 1946.

Q. How long have you been in the Special Intelligence Division? Of the Internal Revenue Service?

A. Since 1940.

Q. What is your personal place of—your present place of duty?

A. Helena, Montana.

Q. Did you ever serve in the Special Intelligence Division in Portland, Oregon?

A. Yes, I was on duty in Portland from 1946 to 1954.

Q. What did your duties consist of?

A. I was a Special Agent. Most of my work consisted of investigating income tax fraud cases.

Q. Did you ever have occasion to prepare financial statements, and net worth statements in your capacity as Special Agent?

A. Yes, I did.

Q. Are you an accountant?

A. Yes.

Q. Are you a certified public accountant?

A. Yes.

Q. Do you have a license to practice accounting?

A. Yes, I have a certificate in Oregon. [462]

Q. Did you ever have occasion to investigate and examine the business affairs of the Petitioners in these proceedings?

A. Yes.

Q. In connection with their income tax liability?

A. Yes.

Q. For what particular years?

A. 1944 through 1949.

Q. How did this occasion arise?

(Testimony of Robert D. Amos.)

A. An information report was received in the Intelligence Division from Revenue Agent L. H. Norris (phonetic), which he wrote in September, 1948, setting out findings of his examination; he discontinued his examination because he found some reason to suspect fraud in the case. He referred the case to the Intelligence Division. It was assigned to me during the fall of 1948.

Q. How long did the investigation take, as far as you were concerned?

A. A year and a half from—during the active investigation. I did some work after that time.

Q. What initial steps did you take, if any?

A. I first talked to Revenue Agent Norris, and Revenue Agent Donald Nicholson (phonetic), after he was assigned to the case.

Mr. Jones: Would you speak a little louder, please?

A. Yes, sir. And the first active work which we did was on January 3rd, 1949.

Q. What did you do then? [463]

A. Revenue Agent Nicholson and I went to Vancouver, B. C., and we first went to the United States Consul's Office to get some information about Mr. Bentson. We found that he was born in 1869, in Iowa, was a United States citizen, had been a resident in Canada since 1906. We obtained his address there; we also found the name and address of the relative to notify in case of emergency, it was Mrs. Fannie Orsen. Our next step was to interview

(Testimony of Robert D. Amos.)

Mr. Bentson. On the same day, Mr. Nicholson and I went to Mr. Bentson's home, at North Vancouver.

Q. What sort of a home did he have?

A. I would have judged it to be a about a five-room house. I was only in the front room—didn't count the rooms, but it was a rather modest appearing home. The lot was not large, I would judge the frontage was fifty to seventy-five feet. The furnishings—— (interrupted)

Q. Was it a comfortable home?

A. I beg pardon?

Q. Was it a comfortable home?

A. Yes, it was comfortable.

Q. Did you see Mr. Bentson? A. Yes.

Q. Will you describe his appearance?

A. Yes, he was an elderly gentleman. He was not particularly well dressed—rather comfortably dressed. I recall that he had on a sweater. [464]

Q. Did you have any conversations with Mr. Bentson concerning his participation in the purchase of seven hundred and fifty shares of Oregon Motor stock, and the loan of three hundred and fifty thousand dollars from the American Business Credit Corporation? A. Yes, I did.

Q. What did he say?

Mr. Jones: If the Court please, that is calling for hearsay, and we object to it on that basis primarily?

Mr. Picco: They have testified to conversations with Mr. Bentson. I think Respondent should be given the same opportunity, your Honor.

(Testimony of Robert D. Amos.)

Mr. Jones: On anything—— (interrupted)

Mr. Picco: And, in particular, to seek to refute some of the things that they claim were said in those discussions.

The Court: I think he should be allowed to testify.

Q. Please answer the question.

Mr. Jones: Well, I have this other objection on this ground, that any conversations that we made were right at the time of the transaction; not five years remote from the transaction, or four years remote from the transaction, and at the time when Mr. Bentson, was, if he died at eighty-one in '50, was approaching the age of eighty, and I feel that any conversation at that time is too remote in the memory of that witness to be entitled to be received here, and consequently irrelevant and immaterial.

The Court: That objection is overruled. [465]

Q. Will you please state what conversation you had with Mr. Bentson?

A. Yes, first, Mr. Nicholson asked Mr. Bentson to explain about the purchase of the Oregon Motor Stages stock. Mr. Bentson then stated that he knew very little about it, and referred us to Ezra Royce and Barney Royce—rather, he stated that they handled most of and he did not remember how it was worked out. He then stated that most of his contact in the transaction had been with Ezra Royce. He mentioned that no money had changed hands in connection with this transaction, and Mr. Nicholson asked him what collateral he put up, in connection

(Testimony of Robert D. Amos.)

with the loan. He refused to state what collateral he had put up.

Q. Was the—was Mr. Bentson cooperative in replying to your questions?

A. Not entirely. He refused to answer any questions about the collateral for the loan.

Q. Did he say anything further about his participation, if any, in the negotiations for the loan of three hundred and fifty thousand dollars?

Mr. Jones: Do you have—if the Court please, does this witness have any independent recollection of this? I would like to know whether he is reading his answers or is testifying from memory?

A. I am refreshing my memory from notes that I took at the time of the interview. [466]

Mr. Jones: I should like to see the notes when you are through with them.

A. I don't recall that he made any statement about the negotiations for the loan.

Q. Did you have any other interviews with Mr. Bentson? A. No, sir.

Q. And that is the extent of the conversation?

A. Yes.

Q. What questions did you ask Mr. Bentson?

A. We asked him the—rather, Mr. Nicholson asked him the general question first, to explain his stock transaction with Oregon Motor Stages. Following that—— (interrupted)

Q. Did he answer that question?

A. He answered it by referring us to Ezra Royce

(Testimony of Robert D. Amos.)

and Barney Royce, and then he followed up with some general statements to the effect that no cash had been put up. I also asked him some questions as to whether he was in Portland at the time of the transaction. He said that he was, and whether he intended to participate in the management. He said that he took it over, that his nephews helped him in running it, but he found it too big, and turned the business over to them. I asked him whether he sold the stock for the same price he paid for it, and he said, "Just about." Finally, he stated that he wanted to find out what the trouble was, and referred us again to Mr. Royce.

Q. What other steps did you take in your investigation of this matter? [467]

A. On January 4th, 1949, Mr. Nicholson and I interviewed Ezra Royce at his office at the Yellow Cab Company regarding the stock transaction in Oregon Motor Stages.

Q. What did he have to say? At that time?

A. Well, he explained that Mr. Bentson obtained a loan from the American Business Credit Corporation. We asked him what collateral was put up. He said that he didn't remember who put up the collateral, and he referred us to Claude McColloch and Robert Jacob, who, he said, were the attorneys who handled the transaction.

Q. Did he say anything about the arrangements for the loan? Did he say who, if anybody, had anything to do with that?

(Testimony of Robert D. Amos.)

A. I will have to refresh my memory. I am not sure.

Q. Just go ahead and look at your notes — as much as you desire.

A. All right. (Referring to notes.) Regarding the arrangements for the loan, he stated that Claude McCulloch and Robert Jacob were the attorneys who handled the arrangements with the loan.

Q. Would you tell us about his attitude in the interview?

A. He was cooperative. He did not furnish us many details. He did refer us to Mr. Jacob for further information.

Q. Did you have any other interviews with E. Royce relative to the stock transaction?

A. Not relative to the stock transaction.

Q. What did you do then? [468]

A. On January 7th, 1949, Mr. Nicholson and I interviewed Robert Jacob at his office, and we also examined—— (interrupted)

Mr. Jones: I can't hear you.

A. And we also examined certain records of the Oregon Motor Stages — the stock certificate, the sheet from the minute book, certain records which Mr. Jacob produced and showed us specific pages only.

Q. What questions did you ask him, if you asked him any, and what answers did you receive, if you have—if you recollect?

A. The questions which were asked were merely

(Testimony of Robert D. Amos.)

the general question regarding the asking him for an explanation of the purchase—— (interrupted)

The Court: Can't you speak a little louder? It's difficult to hear you.

A. We asked him only a general question as to an explanation for the purchase of the stock of Oregon Motor Stages. He explained that Mr. Schneider and Ezra Royce had approached him, and asked him to go in with them in buying the stock. He said that he negotiated with the former stockholders, and he said that he had nothing to do with Mr. Bentson's purchase of stock. He said that he believed Mr. Royce made the arrangements for that. He said that he introduced Mr. Bentson and Mr. Royce to Mr. Davidson of American Business Credit Corporation, and Mr. Bentson then obtained a loan. He did not know what collateral was pledged.

Q. Do you have Exhibit 9? (Exhibit handed.) Did you say you [469] examined some of the records that were in Mr. Jacob's possession at the time?

A. Yes.

Q. Do you remember what some of those were?

A. Yes, there was a letter from Mr. Bentson, offering to sell his stock to the corporation. There was a page from the corporate minutes authorizing the corporation purchase the stock, and there was the stock certificate which had been issued to Mr. Bentson.

Q. I hand you Petitioner's Exhibit 9, and ask you if that is the letter that you saw on that date.

(Testimony of Robert D. Amos.)

It is dated August 31, 1945, from—written by Mr. Bentson, to Oregon Motor Stages?

A. Yes, it is.

Q. And where was that written from, do you know?

A. The date mark has been typed in as Vancouver, B. C., but it is apparent that there was an erasure underneath the D. C. and—— (interrupted)

Mr. Jones: Now, if the Court please, I should think that that is a question for the Court to determine and not a witness as what may have been erased out and typed in, and I object to this gentleman unless he can qualify as an expert on typing and the correction of documents to give that opinion.

The Court: The objection is overruled.

Q. The objection is overruled. You may answer.

A. When I examined this originally, I was able to determine [470] that the word "Washington" had originally been written under "D. C." At this time, I cannot tell what was written there originally.

Mr. Jones: Hold it up to the light and I think you can still tell. I am not cross-examining yet, pardon me.

Q. That was your determination at the time?

A. Yes.

Q. What else did you do in Mr. Jacob's office at this time?

A. I examined the minutes of the meeting of Oregon Motor Stages dated September 5th, 1945,

(Testimony of Robert D. Amos.)

which stated, "Resolved that this company shall purchase a—and retire three hundred fifty shares of stock belonging to L. R. Bentson at the price of one thousand dollars per share, out of the surplus, and that the stock so purchased shall be cancelled." I also examined the stock certificate number seventy-seven for three hundred fifty shares issued to L. R. Bentson on July 2nd, 1945, and I observed that on the back, there was an assignment in blank, which was undated, and was signed by L. R. Bentson.

Q. Did you have any further conversation with Mr. Jacob at that time, or at any later time?

A. No, I don't recall any further conversation regarding this matter.

Q. What—what did you do then? What was the next step in your examination?

A. On the same day, January 7th, '49, Mr. Nicholson and I talked to Malcolm Clark (phonetic) of Portland, who is an attorney, and who stated that he had been the attorney—— (interrupted) [471]

Mr. Jones: Now, if the Court please, on that, he is not a partner in the case—not involved in it. I wish to renew my objection that with respect to Mr. Malcolm Clark, that that would be entirely irrelevant as to—— (interrupted)

The Court: Objection sustained.

Mr. Picco: Did you say sustained, your Honor?

The Court: Yes.

Q. What steps did you take to find anything about the—examine the records of the American Business Credit Corporation, Portland office?

(Testimony of Robert D. Amos.)

A. My investigation disclosed that the Portland office had been closed prior to 1949, and that the records of the company had been shipped to their main office in New York, so I wrote a request to the Special Agent in Charge at New York City, to have a Special Agent call at the main office and obtain photostatic copies of various records pertinent to the loan, three hundred and fifty thousand dollars.

Q. Did you receive those records? A. I did.

Mr. Picco: I think we have stipulated that all of those records are in evidence, your Honor, with the possible exception of Respondent's Exhibit A which will come out later.

Q. What else did you do in your examination of this matter?

A. I examined the records of Oregon Motor Stages—I examined the voucher register, which reflected a check entered on September 6, 1945, payable to L. R. Bentson in the amount of [472] three hundred fifty thousand dollars, and which was debited three hundred fifteen thousand dollars to surplus, thirty-five thousand dollars to capital stock. I also examined another entry in the voucher register dated September 17th, 1945, for a check payable to American Business Credit Corporation, in the amount of three thousand seven hundred thirty-nine dollars seventy-three cents, which was charged to interest expense in the books. That was all—the only examination I made at that time of Oregon Motor Stages' records.

(Testimony of Robert D. Amos.)

Q. Now, that interest—how much was that interest expense—what amount did you say?

A. Three thousand seven hundred thirty-nine dollars seventy-three cents.

Q. Did you see anybody else in connection with the case?

A. Yes, I saw George W. Davidson, at his office in Portland. Mr. Nicholson and I both called on him.

Q. Did you have a conversation of—with him?

A. I did.

Q. What did he say, if anything?

Mr. Jones: Same objection, your Honor.

The Court: Objection sustained.

Mr. Picco: Sustained? Would you let me have Exhibit C? (Exhibit handed.)

Q. I hand you Respondent's Exhibit C, and ask you whether you had an occasion at any time to examine that—that exhibit during your examination?

A. I have examined the document of which this is a copy. I—— (interrupted)

Q. That is correct. A. ——am sure.

Q. You examined the original document?

A. I examined the document which was in the possession of Revenue Agent Donald Nicholson at the time, which I understood to be the original document.

Q. And this is a copy of that? A. Yes.

Q. Now, what does that purport to be?

Mr. Jones: It has already been identified, your Honor, and introduced.

Q. Will you please describe that?

(Testimony of Robert D. Amos.)

A. That is headed "Portland, Oregon, July 17, 1945." Addressed to "Oregon Motor Stages," and states: "In account with George W. Davidson, Pacific Building, to services rendered, fee, four thousand three hundred fifteen dollars seven cents. Approved for voucher July, charge to account forty-six twenty. O.K. Signed E. Royce."

Q. That latter thing there—the O.K. was signed by E. Royce, is that it?

A. Yes, that was signed in pencil, as I recall.

Mr. Picco: Will you mark that as Respondent's Exhibit?

The Clerk: Respondent's Exhibit four N's for identification. [474]

(Respondent's Exhibit NNNN, witness Amos, marked for identification.)

Q. I hand you Respondent's Exhibit four N's for identification, which purports to be an affidavit by George W. Davidson, and ask you whether you notarized that affidavit? Or notarized his signature thereon?

A. Yes, I acknowledged the signature in this affidavit on March 25th, 1949.

Q. Will you state in summary form what that affidavit consists of?

Mr. Jones: I object to that as irrelevant, incompetent, immaterial, purely hearsay—none of the Petitioners having been present or had a chance to question or examine Mr. Davidson on it.

The Court: What do you say?

(Testimony of Robert D. Amos.)

Mr. Picco: In this connection, your Honor, they testified about dealings they had with Mr. Davidson, and what may have been said at those conversations and interviews with Mr. Davidson, and I think the Respondent should have the opportunity of showing this, which is his affidavit, or better yet, let the agent state what Mr. Davidson did tell him. It refutes, actually, what Petitioner said Mr. Davidson did or said to them, and it involves the same period of time, and involves the same matter in negotiations.

The Court: The objection is sustained.

Q. (By Mr. Picco): Did you interview — Mr. Amos, did you [475] interview any other official of American Business Credit Corporation, other than George Davidson?

A. I interviewed Malcolm Clark.

Q. Well, you have passed on that already. In addition to Malcolm Clark? A. No, I did not.

Q. Why is that?

A. I could find nobody else in Portland who knew anything about—who had been connected with American Business Credit Corporation. The Portland office had been dissolved or abandoned some time before. I learned of only one official, Mr. Sheaffer (phonetic) who had been Credit Manager, and he was reported to be in Los Angeles. I could not locate him.

Q. Now, what did you do further, if anything, on your examination?

(Testimony of Robert D. Amos.)

A. I interviewed Mr. Schneider and Mr. Niederkrome.

Q. Would you please tell us about those interviews?

A. Mr. Nicholson and I interviewed Mr. Schneider on January 19th, 1951, at his office at Oregon Motor Stages. Mr. Schneider gave us the background on how Oregon Motor Stages came to be acquired. He said that he had been invited to come to Portland by Mr. Royce to consider acquiring an interest in Yellow Cab Company, but that he decided not to buy an interest in that firm. While he was here, he learned that Oregon Motor Stages' stock was for sale, so he interested Mr. Royce in acquiring Oregon Motor Stages' stock. He said that [476] at first, they lined several investors, but they backed out, and finally Mr. Royce said that he knew an old gentleman who had money, and who would come into the deal. Mr. Schneider did not recall his name at first. He identified him as a shirt-tail relative of Mr. Royce. But when Mr. Nicholson asked him if his name could have been Bentson, he replied that it was. He mentioned that Mr. Bentson's appearance did not suggest very much wealth. He said he did not know how Bentson paid for the stock. He recalled that a loan had been obtained from some loan company, and he recalled that Bentson sold his stock within two or three months, and he thought that Bentson realized a small profit in the sale. He also thought that there may have been some expense in connection with acquiring the stock.

(Testimony of Robert D. Amos.)

Q. Did he say anything about collateral for the loan?

A. He said that he didn't know what collateral was put up. Now, he explained that his own stock certificate was pledged as collateral to Mr. Royce; that he delivered his stock certificate to Ezra Royce, in connection with a loan that—which he had obtained from Mr. Royce. He explained that the total cost of his stock was fifty thousand dollars, and that he was able to raise only twenty-seven thousand dollars at the time, although he expected to raise the balance by the sale of some other property, so he borrowed the balance of the money from Mr. Royce and delivered his stock certificate to Mr. Royce.

Q. Did he tell you about conducting Mr. Bentson on a survey and tour of the route of Oregon Motor Stages? [477]

A. He did not.

Q. Did he discuss the future of Oregon Motor Stages as he saw it?

A. Yes, he did.

Q. What did he say about that?

A. He said that at the time, that he and Mr. Royce and the others bought the stock, that he and Mr. Royce discussed the future of the company, and it was then their opinion that the company would prosper after the war. He had two reasons for it. One was that they thought that wage rates would be reduced following the war, and the second reason was that they expected the population of Oregon would double within the next ten years.

(Testimony of Robert D. Amos.)

Q. Did anything else transpire at this interview?

A. No, that—that's all that I recall that—oh, I did discuss several other issues but Mr.—with Mr. Schneider that had nothing to do with the stock transaction.

Q. You mentioned that you had an interview with Fred Niederkrome too? A. Yes.

Q. Would you tell us some about that?

A. On January 16th, 1951, Mr. Nicholson and I interviewed Fred Niederkrome in our office at the Financial Center Building, Portland. Mrs. Maudie F. Niederkrome was also present. We discussed several issues with Mr. Niederkrome, but among them, we asked him some questions about his acquisition of stock in [478] Oregon Motor Stages. He explained that he had no capital of his own; that he had given his note to Mr. Royce for fifty-five thousand dollars; that he also assigned his stock certificate to Mr. Royce as security for the note.

Q. For his own note?

A. Yes, his own note. He mentioned being present in the conference room at the First National Bank at the time the stock was exchanged from the old stockholders to the new stockholders. He said that he had never heard any discussion regarding Mr. Bentson's interest, that he knew Mr. Bentson acquired stock, but he didn't know why it happened, and he said, as far as he knew, Mr. Bentson may still own stock in the corporation. He said he did not know whether stock was put up as collateral for the loan by American Business Credit Corpora-

(Testimony of Robert D. Amos.)

tion, but he did know that a loan was obtained and he explained the general financing of the transaction. He said that the new group of stockholders put up four hundred thousand dollars, and they borrowed three hundred and fifty thousand dollars. He said he thought that the loan was obtained by the corporation, and he did not know how or when the loan was repaid. That was all that was material to that issue.

Q. Did you have any other interviews in your examination of this matter?

A. No other interviews concerning this one issue of the stock transactions. Oh, pardon me, I did too. I interviewed—— (interrupted) [479]

Q. Did you interview Mrs. Fannie Orsen?

A. —Mrs. Orsen, yes. That was about two years later. It was after we had written our final report and thought the case was closed, and then we learned that Mr. Bentson had died, and that Mrs. Orsen was the Executrix. I interviewed her at her home. I examined certain records.

Mr. Picco: May I have Respondent's Exhibits four B's, four C's, four E's, four G's and H's? (Exhibits handed.)

Q. Did you say you examined the records that were in the possession of Mrs. Fannie Orsen at that time? A. Yes.

Q. I hand you Respondent's Exhibit four E's and ask you if this is one of the exhibits that you— one of the records that you looked at?

A. I would say that I looked at it, but I didn't

(Testimony of Robert D. Amos.)

do anything with it. I was interested in transactions which occurred during the year 1945 and subsequent to it, and I did observe that there were daybooks, from sometime in the middle 1930's up to date, but I did not—— (interrupted)

Q. You didn't use this book in your analysis?

A. No.

Q. I hand you Respondent's Exhibit four C's; it purports to be a daybook, from January 1, 1942, and ask you whether you used that or examined that book?

A. (After examining exhibit.) Yes. Yes, I did.

Q. Will you tell us a little about the examination of that exhibit—book—the daybook? A. Yes.

Q. It's Exhibit four C's?

A. I found that this daybook consisted of a series of income accounts, single entry record, in which there was listed rental income, interest income, dividend income and some sales of stocks. There was also an annuity listed with the income or payments received on that.

Q. The entries covered what period of time on that book?

A. It says on the face of it from January 1, 1942, but I notice that certain assets were entered prior to that. The Government annuity was acquired in October 1934, and as I recall right now, I think that was about the earliest date in here. It goes up until 1950. There were entries in here as late as the middle of 1950.

Q. Now, will you look over the entries for 1945

(Testimony of Robert D. Amos.)

and tell us what was recorded for those years—for that year, '45?

Mr. Jones: Well, doesn't the exhibit speak for itself? I object to this as unnecessary.

The Court: It doesn't seem necessary to me to go into these entries.

Q. Can you tell us—all right, your Honor. Can you tell us whether the Oregon Motor Stages's stock was recorded as being bought or sold in the year 1945 in that book?

A. It was not recorded in any way in this book. I examined [481] this book particularly with that in mind and found no entries in here regarding it.

Q. I hand you Respondent's Exhibit four B's which purports to be the—the photostatic copy of the inventory of the estate, and ask you if you examined that and used that in your analysis?

A. Yes, I did. I examined this and I prepared a statement of net worth of Mr. Bentson as at January 1st, 1945 and as at December 31st, 1945. I used the values in the inventory of the estate for certain assets whose values I was unable to obtain from any other record. I also used entries in the daybook in preparing that. In some cases they were cost figures, and other cases there were sales figures for assets sold later than 1945, and I used the sales figure as the value of the asset in some cases.

Q. Did you have occasion to use Respondent's Exhibit four H's, which has reference to the Government annuity in your analysis?

(Testimony of Robert D. Amos.)

A. I used the amount of the annuity—I got the amount from the daybook rather than from this record. I do not recall seeing this particular record, but I noticed that the amount of payment was thirteen thousand six oh eight.

Q. That's on there.

A. Which was the same figure which I found entered in the daybook as the cost, and I used that figure in the net worth.

Q. And did you have occasion to use Respondent's Exhibit four G's, which purports to be the bank account—savings bank account of Mr. Bentson? [482]

A. (After examining exhibit.) Yes, I did. I examined this bank account. I made a transcript of all the entries in it from the beginning of 1945 until the end. I used the balance at January 1, 1945 and at December 31, '45 in my net worth statement, and I also used one of the figures appearing in 1946, the deposit there to—— (interrupted)

The Court: Speak loudly.

A. To determine the cost or rather value of one tract of real estate. Mr. Bentson's daybook reflected rental from a house and a garage at 1246 Hornby (phonetic) Street. His last rental payment in the daybook was, I believe, March 1st, 1946, and I found a deposit in the passbook—savings account, of seven thousand nine hundred twenty-four dollars eighty-three cents on May 16, 1946. In the absence of any

(Testimony of Robert D. Amos.)

further information, I used that amount as the value of the real estate at 1246 Hornby Street.

Q. Do you have your comparative statement there, that you prepared? A. Yes, I do.

Q. Will you let me see it?

Mr. Picco: I want to have this marked.

The Clerk: Respondent's Exhibit four O's for identification.

(Respondent's Exhibit OOOO, witness Amos, marked for identification.)

Q. I show you Respondent's Exhibit four O's for identification, [483] and ask you to identify that, if you may?

A. This is a comparative statement of net worth of Louis R. Bentson, as at the beginning and end of the year 1945, which I prepared on May 1st, 1952. The information which I used in preparing it was first, the entries in the daybook, covering the year 1945 and subsequently; I also used the inventory of Mr. Bentson's estate, and I used the savings account passbook. At this time, I believe that was all that I used.

Q. What obligations, if any, did you use on this comparative state—— (interrupted)

A. I had—I had no record of any liabilities.

Q. And what did you do with the annuity?

A. I showed the annuity separately at the bottom so that it could be either left in the total or taken out of the total. The cost of the annuity in 1936 was thirteen thousand six hundred and eight

(Testimony of Robert D. Amos.)

dollars. In 1945, its value would be considerably less, but I am not an actuary, and I couldn't determine it. The net worth, including the annuity at cost, would be forty-eight thousand six hundred thirty-four dollars six cents at the beginning of 1945, and fifty thousand five hundred eighty-six dollars twenty-one cents at the end of 1945. And subtracting the annuity, the net worth would have been—— (interrupted)

Mr. Jones: Now, wait a minute, I object to the net worth for the simple reason that there is no showing that he has all of the information that would go in and be necessary to make a net [484] worth statement accurately.

Mr. Picco: If your Honor please——(interrupted)

The Court: The statement would show what it shows as to sources, and the weight to be given it would be another question. He may testify.

Mr. Picco: Yes, that is what I was going to say. It might go to the weight of it. It certainly compares with some of the statements——(interrupted)

The Court: Part of the——(interrupted)

Mr. Picco: I'm sorry.

The Court: It is part of the Respondent's theory at least.

Mr. Picco: We move that into evidence.

Mr. Jones: I have the same objection that I have noted—that there is no showing that——(interrupted)

(Testimony of Robert D. Amos.)

The Court: It will be received.

(Respondent's Exhibit OOOO, witness Amos, received in evidence.)

Q. (By Mr. Picco): As you were saying, if you leave the annuity out of that comparative statement, what is the net worth statement of Mr. Bentson at the end of 1945, and at the beginning of 1945? A. (Examining Exhibit.)

Mr. Jones: As shown by that statement, you mean?

Mr. Picco: Yes, as shown on this statement, Respondent's [485] Exhibit four O's.

A. By leaving the annuity out, the net worth at the beginning of 1945 would be thirty-five thousand twenty-six dollars six cents; at the end of 1945, it would be thirty-six thousand nine hundred seventy-eight dollars twenty-one cents.

Q. And what real property assets do you have on that?

A. I have two tracts of real property; one was described as his home in the inventory of the estate, and contained the legal description, "Lot one and two, block fifty-three." The value of that was forty-two hundred dollars, as taken from the inventory of the estate. Then I have a house and garage at 1246 Hornby Street, which was reflected in the daybook as rental property. The value of that I took from a bank deposit, which appeared shortly after the last entry for any rent in the daybook.

(Testimony of Robert D. Amos.)

Q. That's all, the rest will show on there. I will take these. [486]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Jones): May I see the memoranda that you first testified from?

A. (Memoranda produced) This is the first sheet.

Q. Now, this memoranda would be typed up from your memory of a conversation that you had, is that correct? [507]

A. I took some pencilled notes at the time of the conversation. That memoranda was typed up two days later by using my pencilled notes and my memory.

Q. But there was a couple of days elapsed between the taking it and the typing it up?

A. Yes, that's true; yes.

Q. Now, let me see also the first pencilled notes—or the first memoranda you made at Mr. Royce's interview—first interview with him. I would like to see that other one again also, if I may.

A. (Producing memoranda and notes.)

Q. (After examining memoranda) Well, now, in this interview you had with Mr. Bentson on the 3rd of January, 1949, he did tell you that he had lived in British Columbia for about forty years, and that he had spent ten years of it in mining around Nome, didn't he? I would like to have you look at your second paragraph there. (Memoranda exhibited.)

(Testimony of Robert D. Amos.)

A. You are right except for one point. He said he had lived there for the last forty years, and he had spent ten years mining around Nome, which I think was prior to the forty-year period, yes.

Q. But that he had spent time mining around Nome? A. Yes.

Q. And when he was asked whether or not he was able to put up a half a million dollar collateral, he said "yes," didn't he?

A. Yes, that's what he said. [508]

Q. He experienced some hard of hearing while he was—while you were talking to him, and it was a little difficult to conduct a conversation, wasn't it?

A. Yes, as I recall, he was a little hard of hearing.

Q. May I also see your first one with the interview with Mr. Royce?

A. (Producing memoranda.)

Q. Now, this was dictated the day after you had your conversation, wasn't it?

A. Well, it was typed by me the day after I had the conversation, and it was based on notes which I took at the time of the conversation.

Q. And in this, Mr. Royce informed you that Mr. Bentson had received the same price he had paid for the stock?

A. I am sure of that, yes, I would have to—yes. [509]

* * * * *

Q. (By Mr. Jones): Did he also explain to you that Mr. Bentson's wife had got sick, and that the

(Testimony of Robert D. Amos.)

war was over, and Mr. Bentson wanted to get out?

A. Yes.

Q. He also told you at that time that Mr. Bentson had made eight or nine hundred thousand in Alaska mining?

A. May I see that? (Paper handed.) Yes, he did. [510]

* * * * *

Q. This was the sheet that you refreshed your memory of from your conversation with Mr. Niederkrome? A. Yes, that is correct.

Q. (Examining document) Now, in this, Mr. Niederkrome in this conversation also told you that he expected to own the stock in Oregon Motor Stages—had no capital—had given his note to Mr. [511] Royce for fifty-five but—fifty-five thousand, but that later, the ICC ruled that he could not be a stockholder? A. Yes.

Mr. Picco: That has been stipulated.

Mr. Jones: The stockholders—not the ICC part.

Mr. Picco: Yes, it has.

Mr. Jones: Oh.

Q. And he said also that he told you that the stock was transferred to Mr. Schneider without any gain to him? A. Yes.

Q. Now, do you recall in that conversation whether he made a distinction between the time when this stock was posted as collateral with ABC, and after Mr. Bentson paid his note, and it was subsequently then maybe pledged with Mr. Royce for the remainder of the balance of that note be-

(Testimony of Robert D. Amos.)

cause the facts up to this point show that Bentson was in the picture from July to September?

A. Uh huh.

Q. And then, that Mr. Royce—Mr. Niederkrome sold his stock in '46, and that there was a period between September of '45 and June of '46, when he was still indebted to Mr. Royce, and that that may have been the period that he was pledging his stock for?

A. I didn't understand it that way from his conversation. I understood that he endorsed his stock and gave it to Mr. Royce at the time it was acquired in July, 1945.

Q. Well, from what you found out subsequently from your [512] investigation with ABC, you learned that the stock had been pledged with ABC, didn't you?

A. Yes, but it could, at first, have been given to Mr. Royce, and he could have turned it over to the ABC.

Q. Well, in any event, there is no disposition on your part to imply that the stock wasn't pledged with ABC?

A. Oh, no.

Q. Okay.

A. Mr. Niederkrome didn't know that it had been pledged with them, and he had a good reason that he had given his stock to Mr. Royce.

Q. Well, now, that's your opinion of the matter, isn't it?

A. Yes, but he did say that he didn't know that

(Testimony of Robert D. Amos.)

it had been pledged with ABC, he admit——(interrupted)

Q. Did he say that? A. Yes.

Q. Did he tell you that it hadn't been pledged with ABC?

A. May I look at that again? I am pretty sure that he did. (Document exhibited.) Well, he said he did not know whether stock was put up as collateral with ABC.

Q. Well, now, this was—this meeting was in '51—that was six years after the event, wasn't it?

A. Yes.

Q. Did he get out any records while he was talking to you? A. No. [513]

Q. He was just talking from memory to you?

A. Yes.

Q. (Examining document) Now, was not your testimony on direct examination that the loan of three hundred and fifty thousand that Mr. Niederkrome stated was made to—was made by ABC to Oregon Motor Stages?

A. Yes, he said that he thought it was.

Q. Yes, he thought it was in here. Now, that was six years after the transaction took place, and he didn't refer back to any documents or anything when he was talking to you?

A. No, he did not.

Q. Now, could not that possibly have been that what he said was he thought the loan was paid, rather than made by ABC—or by the corporation to ABC?

(Testimony of Robert D. Amos.)

A. That wasn't my understanding.

Q. Well, could you have misunderstood him on that point, possibly?

A. May I look at that a moment again?

Q. Yes, you may.

A. I think not, because following that, he did make the statement regarding the repayment, to the effect that he did not know how or when the loan is repaid.

Q. You typed this up after your conversation, didn't you?

A. Yes, I typed it on the—that's January 16—I typed it the same day. [514]

Q. But you typed it subsequent to your talk with him? A. Yes, uh huh.

Q. And there is a possibility that you could have misunderstood him there, isn't there?

A. Well, just a moment, I might look at my original notes that I made right at the time. (Checking notes.) No, my original notes, I have two statements, that he does not know how or when the loan was repaid—probably an obligation to the corporation, and following that, he thinks the loan was to the corporation.

Q. But he never categorically said so—that it was to the corporation?

A. Oh, he just said he thought it was, yes.

Q. Yes, and then, we said it was a long time after the events? A. Yes. [515]

* * * * *

Q. Let me see this one now, please? (Document

(Testimony of Robert D. Amos.)

handed.) (Examining document.) Now, on this net worth statement that you prepared for Mr. Bentson, you had nothing to work with in doing that except such records as you got from his niece?

A. That's true. That included the inventory of the estate.

Q. Yes, but you had never talked to Mr. Bentson about what his assets were, and try to secure a list of those from him?

A. I had attempted to.

Q. Well, you didn't get any, did you? You didn't have any?

A. He would not give us the information.

Q. You didn't have them, that is my question?

A. No.

Q. And you don't know what his worth was in 1945 at all?

A. No, except as his records reflected, his daybook and passbook.

Q. That was all built backwards from 1950 with such information as you got from the niece, and the inventory?

A. The daybook, of course, was examined in 1952, but the information in it was recorded from about 1936, up through 1950.

Q. Yes, but you had to assume that that was the only records that he had that recorded his transactions when—that and the inventory and the bank statement and the annuity?

A. True enough. I didn't know whether there could have been other records. [518]

(Testimony of Robert D. Amos.)

Q. There could have been other records, and there could have been assets not reflected there?

A. Quite true.

* * * * *

DONALD D. NICHOLSON

a witness called on behalf of the Respondent, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record?

The Witness: Donald D. Nicholson, Portland, Oregon.

The Clerk: That is N-i-c-h-o-l-s-o-n, or how do you spell it?

The Witness: Correct. [519]

Direct Examination

Q. (By Mr. Picco): What do you do, Mr. Nicholson? A. I am an Internal Revenue Agent.

Q. How long have you been an Internal Revenue Agent? A. Since October 8, 1945.

Q. Did you assist Mr. Amos in the examination and investigation of the income tax liability of Mr. Royce and the other Petitioners in these proceedings? A. I did. [520]

* * * * *

Q. Now, Mr. Nicholson, did you hear Mr. Amos testify today? A. Yes.

Q. Did you hear him testify as to interviews with Mr. Bentson, Mr. E. Royce, Mr. Schneider, Mr. Jacob? A. Yes.

Q. Were you present at those interviews?

(Testimony of Donald D. Nicholson.)

A. Yes.

Q. If asked the same questions as to what transpired at those conferences or interviews, would your answers be substantially the same as Mr. Amos' answers? A. Yes, sir.

Q. Would you verify the account of what transpired—Mr. Amos' account of what transpired at those conferences? [521]

A. By the use of notes, I could. [522]

* * * * *

E. ROYCE

a witness recalled by the Respondent, assumed the stand and testified as follows: [527]

* * * * *

Cross Examination* * * * *

Q. (By Mr. Jones): Now, there is one other question I want to ask this witness that goes back to the partnership accounts while I have him on the stand. When you were—when your wife Dora was cashing some of these distribution checks, did the tellers ever require your signature?

A. Yes, they did.

Q. Would you sometimes be with her at the window at the time?

A. Most of the time, because those checks were large amounts and she didn't feel that she wanted to be alone. [535]

Q. Do you know whether or not she ever—or whether the deposits in her account were made from her distributions? A. Yes, they were.

* * * * *

Mr. Picco: Now, if your Honor please, we have no other witnesses, but I do have an exhibit that I want to introduce at this time. It is Respondent's Exhibit A for identification. It has been stipulated that it is a true and correct copy of the meeting of the Executive Committee of American Business Credit Corporation, the parent company, in which the loan—the application loan for three hundred and fifty thousand dollars was acted upon and considered. There is going to—the objection to this instrument will be given by Mr. Jones. I want to move it into evidence, and I would like to state my grounds, your Honor.

The Court: Tell me again exactly what it is?

Mr. Picco: It is a copy of the minutes of a meeting of the Executive Committee of American Business Credit Corporation; the Delaware corporation, that is the main corporation. It owned the subsidiary corporation, American Business Credit Corporation, Portland, held on June 20, 1945, at its offices in New York, and it [536] refers to the application for loan of three hundred and fifty thousand dollars, and it was acted upon and considered at this meeting, and we have—— (interrupted)

The Court: This is by the parent company?

Mr. Picco: That is correct, and it is duly certified by the Custodian of the records. As you remember, it has been stipulated into evidence that the Portland corporation was dissolved, and the records were transferred to the parent corporation. This is a part of the negotiations phase of the stock question, Section 115G. It is an integral part of those—

of the records of the lending institution. We have stipulated, and there is in evidence, other exhibits which make up the rest of that file from the lending institution. We have Exhibit 1, which is the joint note signed by the Petitioner, Ezra Royce and L. R. Bentson. We have Exhibit B, which is the check by American Business Credit Corporation, made payable to L. R. Bentson and Ezra Royce for three hundred and fifty thousand dollars, and the money comes from the New York office to the Portland office. Exhibit C, the invoice dated July 17, 1945, showing Oregon Motor Stages paying finance charges to George W. Davidson, of American Business Credit, in the amount of four thousand three hundred and fifteen dollars and seven cents—Exhibit D, which is a cash receipts report of American Business Corporation, showing receipt of this four thousand three hundred and fifteen dollars and seven cents, and referring to the E. Royce and L. R. Bentson account. Respondent's Exhibit E, which is a cash receipts report of American Business [537] Corporation, showing a receipt of three hundred and fifty thousand dollars, reference, E. Royce and L. R. Bentson account. We have Respondent's Exhibit F, bank account of American Business Credit Corporation, the parent office, home office, New York, showing deposit by the Portland branch, American Business Credit Corporation to the account of the American Business Corporation, parent corporation, September 17, 1945; and we also have Exhibit G, the account, "Royce and Bentson" on the ledger sheet of American Business

Credit, Portland. All of these are part and partial to the files of the lending institution, and I move the admission of this document, Respondent's Exhibit A, for identification on that ground.

Mr. Jones: I would like to be heard on that, because we strenuously object to its admission in evidence on the ground that it is incompetent, irrelevant, immaterial, and purely hearsay. These other documents that he meant—mentioned where there were payments back and forward, we had no objection to and consequently were quite willing to assist the Government by admitting them and putting them to no trouble. Here, there is an affidavit by a person who was not an officer of the corporation at the time the affidavit—at the time the transaction took place, he was the Secretary at the time the affidavit was made—he—certifies to that affidavit—through that affidavit that the photostat there is a true copy of minutes of a certain meeting. Those minutes, however, report a report of Mr. Davidson who is dead. There is no showing that Mr. Royce or Mr. Jacob or Mr. Bentson or anybody else was back east. [538] There is no evidence that they were there; that they knew what Mr. Davidson was saying. The affidavit, the report of Mr. Davidson, at that Executive Committee in the east was the purest kind of hearsay. He was the Manager out here trying to get a loan through. And we weren't—no party—no purchaser was there being represented. I want it clearly understood that I have stipulated that I have no objection to the authenticity or to the identity of this thing, but I have strenuous objec-

tions on the grounds of materiality and hearsay. I would like to just cite a sentence or two from two cases. They are—one is a Federal case, one hundred and forty Federal, three eighty-five, on page 402, which states, “that the records of a private corporation are not competent evidence against third persons to establish their relation of stockholders to the corporation, or to approve the contracts between them and the corporation, in the absence of proof of their knowledge—the third person’s knowledge, and a set to the minutes,” and that is the case of *Harrison versus Remington Paper Company*. I will also cite, and I have several here, but I will only cite the two of them—the case of *Morrow West (Phonetic) versus some corporation*—I can’t read the name of it, in second Southern forty, at page forty, in which it says, “the books of a corporation are admissible against the company and its members only on the principle that they are admissions. They are not evidence against strangers.” And here, it is the purest kind of hearsay, with none of these people there whom he seeks to bind or to charge with whatever is in those minutes. Furthermore, I point out [539] in the affidavit, that in paragraph six of the affidavit, the gentleman who made it, attempts to state something about a loan when the affidavit bears the date of 1955, the 21st day of April, about something that happened ten years before, when he wasn’t present or knew anything about it. And for that reason, I think it is the purest hearsay. We object to the photostat and to all parts of the affidavit, insofar as they state facts.

Mr. Picco: We also have authorities for that proposition, basically, and very soundly, it is part of the records of the lending institution, and it has genuineness and reliability because of that. It is very clear from reading that that they acted and considered the loan application, and I think it is very material to the case, and I think it is admissible under the authorities.

The Court: The objection is overruled; the document may be admitted. Exhibit A.

The Clerk: Admitted?

The Court: Admitted.

(Respondent's Exhibit A received in evidence.) [540]

* * * * *

AUGUST WENCK

a witness called on behalf of the Petitioner, first having been duly sworn, testified as follows:

The Clerk: Will you please state your name and address for the record, please?

The Witness: August Wenck. [542]

The Clerk: Will you spell your name, please?

The Witness: W-e-n-c-k. 902 Madison Street, Seattle, Washington.

Direct Examination

Q. (By Mr. Jones): Mr. Wenck, how long have you lived in Seattle? A. Since 1932.

Q. What is your occupation in Seattle?

A. I am Manager of the Seattle Yellow Cab Company.

Q. And were you connected with the Seattle

(Testimony of August Wenck.)

Yellow Cab Company prior to 1944? A. Yes.

Q. Was it a corporation then? A. Yes.

Q. And liquidated?

A. About that time.

Q. In the middle of 1944. I am not going into the exact—— (interrupted)

A. I am not sure that that is the exact date. I don't have that with me. But it is about at that date.

Q. All right, and was there a liquidation meeting in Seattle of the stockholders of that company?

A. Was there a meeting?

Q. Liquidation meeting—when it was dissolved?

A. Yes. [543]

Q. Was Mrs. Dora F. Royce present?

A. Yes.

Q. And Mr. Royce? A. Yes.

Q. Mr. E. Royce, Mr. B. Royce? A. Yes.

Q. I believe Mrs. Isabelle Royce was there?
I don't know, but anyway—— (interrupted)

A. I don't think so; I can't remember.

Q. The three that I mentioned? A. Yes.

Q. You were there? A. Yes.

Q. And they were stockholders in the company at the time? A. Yes.

Q. They turned in their stock? A. Right.

Q. A partnership was formed? A. Yes.

Q. Now, then, you have at all times, since this partnership, been its Manager? A. Yes.

Q. And does the partnership regard Mrs. Dora F. Royce as a bona fide partner?

(Testimony of August Wenck.)

A. Oh, yes. [544]

Q. Always has? A. Yes.

Q. Does she do any work for the partnership?

A. She gives me lots of help and assistance whenever she is in Seattle, and I am always glad to have her visit Seattle.

Q. How frequently does Mr. Royce come to Seattle? A. Not very often.

Q. I am talking of E. Royce?

A. I assumed you were.

Q. Yes. A. Not very often.

Q. And is her time in Seattle somewhat equivalent to his time?

A. Well, I think she gets up there a little oftener than he does.

Q. What kind of work does she do when she is there?

A. Well, she helps in a general way, in doing some checking on drivers, and concessions, and reports to me what she sees in cab activities around town, when she is there, at department stores, hotels, and things like that.

Q. Has she ever had conferences with you concerning the company?

A. Always reports to me every time she is there.

Q. And did she ever discuss policy with you?

A. Well, she reports incidents like when a cab is dirty, or a [545] driver isn't tidy, or some discourteous part on the part of a driver, or someone else, a starter, why, she has no hesitancy telling me

(Testimony of August Wenck.)

about it, giving me the time and the place that it occurred.

Q. I have requested you to bring down some distributions of dividends checks, did you bring them?

A. Yes, I have them here.

Mr. Jones: I would like to have two packages of checks marked as exhibits.

(Petitioner's Exhibits 43 and 44, witness Wenck, marked for identification.)

Q. Now, then, does—is there a partnership in there for Eunice Royce, represented by E. Royce, trustee?

A. That's right.

Q. And does it get distributions?

A. It does.

Q. Is that regarded as a valid partner in the thing?

A. Absolutely.

Q. Do they get distribution—does the trustee get distributions for Eunice?

A. That's right.

Q. Are those checks also here?

A. Yes.

Q. I am going to hand you first, Exhibit number 43 for identification, and ask you if this is the group of checks for 1945, through 1949, that are the distribution checks made to Mrs. Dora F. Royce?

A. These checks are made to Mrs. Royce.

Q. Are they her distributive share?

A. Yes.

Q. Where are the 1944 checks? Were you able to find them?

A. No, and I don't think you will find the '48's in here. In fact, I know you can't. We tried very hard the other day to locate them.

(Testimony of August Wenck.)

Q. Oh, aren't the '48's there?

A. The '48's are not in there.

Q. And the '44's? A. That's right.

Q. Is that all the checks you could find?

A. This was from May 31st, '45. We could find them if we wanted to tear the place apart a little more, but it was quite a job to get those.

Q. All right, were all of the distributions shown on her—on the books of the company—— (interrupted) A. Oh, yes.

Q. ——made to her? A. Oh, yes.

Q. By checks similar to this? A. Yes.

Q. I am handing you herewith Exhibit number—— (interrupted)

The Clerk: Petitioner's Exhibit 44 for identification.

Mr. Jones: I would like to offer Exhibit 43 first, in [547] evidence.

Mr. Picco: I have no objection, your Honor.

The Court: It may be received.

(Petitioner's Exhibit 43, witness Wenck, received in evidence.)

Q. (By Mr. Jones): Now, I would like to hand you here, Exhibit number 44 for identification, and ask you to please state what that is?

A. These checks are made payable to E. Royce, trustee, and credited to the account of E. M. Royce.

Q. Now, does that represent this Eunice interest in the partnership?

A. Eunice Royce, and her name now is Mrs. Dodge.

(Testimony of August Wenck.)

Q. Mrs. Dodge? A. Yes.

Q. And those are in distribution of her—— (interrupted) A. Interest in the partnership.

Q. Now, are there any missing checks over the years—— (interrupted)

A. '48's are also missing from that group, I think.

Q. And what about '44?

A. That same period, I think—May 31st, '45.

Q. Any distribution shown by the books in evidence—were they actually made by similar checks?

A. That's right. There is a record of every one of those [548] checks.

Q. Is her interest recognized the same as Mrs. Royce's, as a bona fide interest in the company?

A. She's a partner.

Q. And you at all times recognize her and understand her to be a partner? A. Positively.

Q. Now, in—— (interrupted)

The Court: Are you offering 44? Are you offering the '44 checks?

Mr. Jones: Oh, yes, I am offering 44.

The Clerk: Was 43 admitted?

Mr. Jones: And we offer 44.

The Clerk: Now just a minute.

The Court: It is admitted.

(Petitioner's Exhibit 44, witness Wenck, received in evidence.)

Q. I would like to know, in 1945, if anybody every—ever contacted you with respect to becoming

(Testimony of August Wenck.)

an investor in the Oregon Motor Stages, an Oregon corporation? A. Me, you mean?

Q. Yes. A. Yes.

Q. Who contacted you with respect to buying stock in that company? [549]

A. Mr. E. Royce.

Q. Has the Yellow Cab Company of Seattle, during the period 1949 on—1944 on, shown any losses? 1944 on to date, shown any losses?

A. Definitely for the past two years it has shown losses.

Q. Have these two accounts of Dora F. Royce and Eunice Royce been charged with their share of those? A. Oh, yes.

Mr. Jones: You may cross examine.

Mr. Picco: I have no cross examination, your Honor, except I do want to point out, just for your information without having to go into the record that the Petitioner's Exhibit 43, which are the checks going to Dora F. Royce—everyone of them on the reverse side, has been endorsed in blank to Ezra Royce—endorsed in blank to Ezra Royce.

* * * * *

F. C. NIEDERKRÖME

a witness recalled by the Petitioners in rebuttal, testified as follows:

Direct Examination [550]

Q. (By Mr. Jones): Will you kindly explain how your stock is pledged—both—could be pledged both to ABC and to Mr. Royce, if it was pledged to Mr. Royce?

(Testimony of F. C. Niederkrome.)

A. I don't think—— (interrupted)

Mr. Picco: Will you state that question again?

Q. Will you kindly explain how your stock happened to be pledged both to ABC and Mr. Royce, if it was pledged to Mr. Royce?

A. Of course, originally it was pledged to ABC, in July; then when the Oregon Motors paid the loan, I may have pledged it to him after that date.

Q. Now, you are talking about your Oregon Motor stock, during the time you were a stockholder?

A. Yes, after the time I—after June of 1946.

Q. Did you talk to the Revenue Agents along in 1950 or '51, wherever it was—did you get any of your records out to look up and see exactly what the transactions were? A. No, I didn't.

Q. You were talking solely from memory then?

A. That's right.

Q. Giving them your recollection the best as it was without refreshing it? A. Yes.

Q. Now, did you ever tell any Revenue Agent that the loan was—of three hundred and fifty thousand was made to the Oregon Motor Stages? [551]

A. I don't think so. I think what I told them was that the payment was made by the Oregon Motor Stages.

Q. At least you have no recollection of ever attempting to leave such an intention, such an impression as that?

A. No, as a matter of fact, I don't remember that they asked me that question.

(Testimony of F. C. Niederkrome.)

Mr. Jones: You may cross examine.

Cross Examination

Q. (By Mr. Picco): Mr. Niederkrome, you—now, you say that you pledged the Oregon Motor Stages' stock twice?

A. After the loan was paid, the certificate came back to me, but I was indebted to Mr. Royce. If I pledged it at all to him, I pledged it to him as a loan on which I was obligated.

Q. Mr. Royce was — waited — waited for the pledge on his loan—his loan was back in July 2, 1945, wasn't it?

A. That is right.

Q. But he accommodated you when he pledged —when you pledged it over on the other loan of three hundred and fifty thousand dollars?

A. I pledged along with the other stockholders on the ABC loan.

Q. Then when the three hundred and fifty thousand dollar loan was paid up, why, it became a collateral for the loan that you had taken out formerly from—— (interrupted) [552]

A. That would be the time, if I pledged it at all as collateral. I can't ever remember them, and I can't remember stating that I had pledged it.

Mr. Picco: That's all, your Honor.

Redirect Examination

Q. (By Mr. Jones): That, however, in any event, was an actual purchase of stock on your own responsibility?

A. That's right. [553]

* * * * *

A. L. SCHNEIDER

a witness recalled by the Petitioners, in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you come back, Mr. Schneider. You can answer this question right there if you want to. In your pledging of your stock, what stock did you pledge to Mr. Royce?

A. The stock that I pledged to Mr. Royce was the fifty-five shares that was purchased from Mr. Niederkrome when the ICC asked him to divest his interests.

Q. And not your fifty shares you originally purchased? [555]

A. The first fifty shares that I purchased was never pledged to Mr. Royce.

* * * * *

Mr. Picco: We have a stipulation here. It is not in my handwriting. I know the matter of fact of it, but I will try to read it, for what it's worth. "It is stipulated between the parties by their respective counsels that the fair market value of the common capital stock of Aldergold Copper Company was seven and a half cents per share in each of the years 1947, 1948 and 1949," now, that is what we settled on—"and in determining what income if any E. Royce received from that source in said year, that value may be used. It is further stipulated that testimony may be taken by deposition to determine the number of such shares E. Royce received in each of those years, if any. It is further stipulation—

(Testimony of A. L. Schneider.)

stipulated that Petitioner — that Petitioners — that petitions of E. Royce may be amended in such manner as necessary to conform them to the proof." That means we will need a deposition. Outside of that, I think the case is completed. [556]

* * * * *

[Endorsed]: T.C.U.S. Filed June 9, 1955.

[Endorsed]: No. 15724. United States Court of Appeals for the Ninth Circuit. Fred C. Niederkrome, E. Royce, Dora F. Royce, Ezra Royce, B. Royce, Estate of Isabelle H. Royce, Deceased, B. Royce, Executor, Robert T. Jacob, Agnes C. Jacob, Albert L. Schneider and Bertha Schneider, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: September 16, 1957.

Docketed: September 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 15724

Fred C. Niederkrome; E. and Dora F. Royce; Ezra
Royce; B. Royce; Estate of Isabelle H. Royce,
Deceased, B. Royce, Executor; Robert T. and
Agnes C. Jacob; Albert L. and Bertha Schnei-
der, Petitioners,

vs.

Commissioner of Internal Revenue, Respondent.

STATEMENT OF POINTS ON WHICH
PETITIONERS INTEND TO RELY

Come now the petitioners, by their attorneys Louis Eisenstein, Randall S. Jones, and Eberhard P. Deutsch, and hereby state that they intend to rely on the following points in these proceedings on appeal from judgments of the Tax Court of the United States:

The Tax Court of the United States erred:

(1) In holding and deciding that an amount paid in 1945 by Oregon Motor Stages to L. R. Bentson in retirement of all the stock held by L. R. Bentson in Oregon Motor Stages, and that certain incidental disbursements paid by Oregon Motor Stages in the same year, constituted distributions taxable as dividends to the individual petitioners and the deceased Isabelle H. Royce.

(2) In admitting into evidence respondent's Ex-

hibit A, which purports to be a copy of the minutes of the Executive Committee of American Business Credit Corporation, a Delaware corporation, held on June 20, 1945, certified by the treasurer and assistant secretary of the said corporation.

(3) In holding and deciding that the petitioner Ezra Royce was taxable for the years 1944 through 1947 with respect to the income of a partnership, doing business as Yellow Cab Company in Portland, Oregon, which was distributable to his wife Dora F. Royce.

(4) In holding and deciding that the petitioner Ezra Royce was taxable for the years 1945 through 1947 with respect to the income of a partnership, doing business as Yellow Cab Company in Seattle, Washington, which was distributable to his wife Dora F. Royce.

(5) In holding and deciding that the petitioner Ezra Royce was taxable for the years 1945 through 1947 with respect to the income of the said partnership, doing business in Seattle, Washington, which was distributable to a trust for the benefit of his daughter Eunice M. Royce.

(6) In holding and deciding that the petitioners Ezra Royce and Dora F. Royce were taxable for the years 1948 and 1949 with respect to the income of the said partnership, doing business in Seattle, Washington, which was distributable to the said trust.

(7) In holding and deciding that the sum of \$20,000 advanced by Hippodrome Amusement Com-

pany to the petitioner Ezra Royce in 1945 was taxable to him as a dividend.

(8) In that its opinion and decisions are not supported by but are contrary to the evidence and its findings of fact.

(9) In that its opinion and decisions are contrary to law and the Commissioner's regulations.

/s/ LOUIS EISENSTEIN,

/s/ RANDALL S. JONES.

/s/ EBERHARD P. DEUTSCH,

Counsel for Petitioners.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sept. 26, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between counsel for the respective parties, subject to the approval of the Court, that the documents and exhibits included in the transcript of the consolidated record in the cases on review need not be printed, and that the aforesaid documents and exhibits not incorporated in the printed record shall be considered for all purposes as a part of the printed record herein and may be referred to by counsel in their respective briefs and on oral argument; or reproduced in whole or in part in an appendix to their briefs; and considered by the Court

with the same force and effect as if actually included in the printed record on review filed herein.

s/ LOUIS EISENSTEIN,

Counsel for Petitioner.

s/ CHARLES K. RICE,

Assistant Attorney General,

Counsel for Respondent.

[Endorsed]: Filed Sept. 26, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD OF PRINTING

Petitioners hereby designate for printing the following parts of the record in the above-entitled causes material to the consideration of the petitions for review:

1. Docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court, as follows:

(a) Petitions, including annexed copies of notices of deficiencies.

(b) Answers.

3. Introductory paragraph of Stipulation of Facts filed on May 14, 1955; paragraphs numbered 11, 12, 13, 14, 15, 18, 22, 23, 24, and 25 of said Stipulation of Facts; and the two paragraphs

headed "Exhibits," appearing immediately after paragraph 43, of said Stipulation of Facts.

4. Supplemental Stipulation of Facts filed on June 1, 1955.

5. Portions of the official transcript of the consolidated proceedings before the Tax Court, as follows:

* * * * *

6. Memorandum findings of fact and opinion of the Tax Court.

7. Decisions of the Tax Court.

8. Petitions for review.

9. Statement of points on which petitioners intend to rely.

10. Stipulation relating to documents and exhibits.

11. This designation of contents of record for printing.

/s/ LOUIS EISENSTEIN,

/s/ RANDALL S. JONES,

/s/ EBERHARD P. DEUTSCH,

Counsel for Petitioners.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sept. 26, 1957. Paul P. O'Brien, Clerk.

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15724

FRED C. NIEDERKROME, E. ROYCE, DORA F. ROYCE, EZRA ROYCE, B. ROYCE, ESTATE OF ISABELLE H. ROYCE, DECEASED, B. ROYCE, Executor, ROBERT T. JACOB, AGNES C. JACOB, ALBERT L. SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petitions for Review of the Decisions of the Tax
Court of the United States

REPLY BRIEF FOR PETITIONERS

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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15724

FRED C. NIEDERKROME, E. ROYCE, DORA F. ROYCE, EZRA ROYCE, B. ROYCE, ESTATE OF ISABELLE H. ROYCE, DECEASED, B. ROYCE, Executor, ROBERT T. JACOB, AGNES C. JACOB, ALBERT L. SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**On Petitions for Review of the Decisions of the Tax
Court of the United States**

REPLY BRIEF FOR PETITIONERS

We respectfully submit that the respondent's brief fails to justify the decisions below. Indeed, his various contentions confirm our view that the Tax Court has gravely erred in sustaining the disputed deficiencies. We will now examine the respondent's arguments in order to focus on the precise differences between the parties.

I. Oregon Motor Stages

1. In so far as section 115(g) is concerned, the respondent's entire case rests precariously on an alleged conspiracy in tax avoidance. According to the respondent, "the taxpayers evolved a plan to acquire complete ownership of

Oregon Motor Stages, whose stock was worth \$750,000, by using \$350,000 of Stages' surplus as part payment. This was accomplished by setting up one Bentson as a straw man, an ostensible borrower of \$350,000 from ABC and an ostensible stockholder in the corporation." (Resp. 36. See also *id.* 43, 48.) As the respondent seems to realize (Resp. 43, 48), this accusation necessarily presupposes that the five petitioners entered into an anticipatory plot to avoid income tax. For, obviously, there was no sense in resorting to Bentson as a "straw" except as a means of escaping the dividend tax on a quick redemption of the 350 shares. Unless the petitioners, well in advance, deliberately set out to divert an impending tax on a contemplated distribution, the deception with which they have been charged served no function whatever. Even the respondent has been unable to supply any other possible motive for the scheme which he has imputed to the petitioners via Bentson. By the same token, then, the respondent's argument completely breaks down. The record does not contain the least suggestion of intrigue or machination in tax avoidance. Nor did the Tax Court at all intimate that the petitioners were animated by any such motive. In short, in order to sustain substantial deficiencies the respondent has simply conceived some sort of elaborate plan which lacks any discernible purpose.

2. Quite apart from this alleged plot without purpose, the respondent's argument has little to commend it. The respondent concedes that there is evidence, given by all five petitioners, "that Bentson took an active part in the purchase of the stock and the negotiations for the loan from ABC." (Resp. 45.) However, the respondent then attempts to bypass the evidence. "That Mr. Bentson did not participate in the events leading up to the negotiation of the loan," he declares, "is apparent from the statements of the taxpayers to the revenue agents prior to the trial herein, from the records of ABC and from the fact that negotiations for the loan were made prior to the time Bentson even

arrived in Portland, thus making it physically impossible for him to have submitted the application for the loan, and/or to have participated in the negotiations.” (Resp. 45-46.) In other words, the respondent relies essentially on three specific items as reasons for ignoring Bentson despite the positive, detailed testimony of the five petitioners. The three items are Bentson’s alleged arrival after the loan was negotiated, the evidence of the revenue agents, and Exhibit A. Since we have fully examined the first item in our prior brief, it seems unnecessary to reappraise it. In holding that Bentson could not have participated in the negotiations, the Tax Court simply became entangled in an imaginary difficulty of its own making. (Pet. 38-39.) The respondent has noticeably made no effort to indicate otherwise. He has been content to repeat what the Tax Court erroneously surmised. (Resp. 47.) Therefore, we turn to the remaining two matters on which the respondent relies: the testimony of the revenue agents and Exhibit A.

3. Two agents testified on behalf of the respondent. They were Robert D. Amos and Donald D. Nicholson. (R. 577, 609.) Nicholson merely stated that his answers would be “substantially the same as Mr. Amos’ answers.” (R. 610.) Hence we need only consider the testimony of Amos. As persuasive proof that Bentson “did not take part in the negotiations leading up to the loan” (Resp. 37), the respondent refers to Amos’ summaries of his conversations with E. Royce, Jacob, and Niederkrome during his investigation. (Resp. 45-47.) The respondent has managed to find in Amos’ testimony far more than it reveals. At the same time he has been a good deal less than complete in quoting and paraphrasing Amos’ evidence for the benefit of the Court. What has been omitted is not in accord with what has been inferred.

On the basis of Amos’ testimony the respondent says, “E. Royce informed the revenue agents that the financial arrangements with respect to the ABC loan were handled

by Jacob and McCulloch, the attorneys for the former stockholders." (Resp. 45.) "This statement," the respondent then observes, "is, of course, in marked variance with the testimony given by E. Royce during the trial herein." (Resp. 45, n. 4.) When Amos' testimony is read, the "marked variance" is nowhere to be found. What E. Royce stated to Amos he later stated in court. On direct examination Amos testified (R. 583-584):

"A. On January 4th, 1949, Mr. Nicholson and I interviewed Ezra Royce at his office at the Yellow Cab Company regarding the stock transaction in Oregon Motor Stages.

Q. What did he have to say? At that time?

A. Well, he explained that Mr. Bentson obtained a loan from the American Business Credit Corporation. We asked him what collateral was put up. He said that he didn't remember who put up the collateral, and he referred us to Claude McCulloch and Robert Jacob, who, he said, were the attorneys who handled the transaction.

Q. Did he say anything about the arrangements for the loan? Did he say who, if anybody, had anything to do with that?

A. I will have to refresh my memory. I am not sure.

Q. Just go ahead and look at your notes—as much as you desire.

A. All right. (Referring to notes.) Regarding the arrangements for the loan, he stated that Claude McCulloch and Robert Jacob were the attorneys who handled the arrangements with the loan.

Q. Would you tell us about his attitude in the interview?

A. He was cooperative. He did not furnish us many details. He did refer us to Mr. Jacob for further information."

On cross-examination Amos produced the memoranda of his conversation with E. Royce, and further testified as follows (R. 603-604):

"Q. Now, this was dictated the day after you had your conversation, wasn't it?

A. Well, it was typed by me the day after I had the conversation, and it was based on notes which I took at the time of the conversation.

Q. And in this, Mr. Royce informed you that Mr. Bentson had received the same price he had paid for the stock?

A. I am sure of that, yes, I would have to—yes.

* * * * *

Q. (By Mr. Jones): Did he also explain to you that Mr. Bentson's wife had got sick, and that the war was over, and Mr. Bentson wanted to get out?

A. Yes.

Q. He also told you at that time that Mr. Bentson had made eight or nine hundred thousand in Alaska mining?

A. May I see that? (Paper handed.) Yes, he did."

We fail to see how this testimony proves that Bentson was a "straw" for the petitioners. We also fail to see how this evidence in any way contradicts the testimony of E. Royce or impairs his credibility. E. Royce told Amos exactly what he stated at the trial—that Bentson obtained the loan from ABC-Portland; that Bentson paid for the stock; that Bentson received the distribution in redemption of the stock; and that Bentson decided to dispose of his stock after the war ended and his wife became ill. (Pet. 4-7, 43-44.) Although the respondent purports to give a fair summary of Amos' testimony, all this is omitted in the effort to find a "marked variance." The respondent seems to derive some comfort from E. Royce's statement that Jacob and McColloch "handled the arrangements with the loan." Needless to say, E. Royce was only indicating that the legal aspects of the loan were handled by the two attorneys who represented the buyers and sellers.

The respondent's next item of evidence through Amos is the latter's summary of his conversation with Jacob. To quote the respondent once more, Jacob told Amos "that his part in the loan negotiations was limited to introducing E. Royce and Bentson to George Davidson, manager of

ABC-Portland, and that the loan negotiations were carried on by them.” (Resp. 45.) The respondent then admits that Jacob told “the same story” at the trial (Resp. 45)—and that story, of course, was that Bentson actively participated in the purchase of the stock and the negotiations for the loan. (Pet. 4-6, 33-34.) Again we are at a loss to understand how Amos’ testimony enables the respondent to say that his view of the facts is supported by “the statements of the taxpayers to the revenue agents prior to the trial herein.” (Resp. 45.) As Amos reported the conversation in question, Jacob “explained that Mr. Schneider and Ezra Royce had approached him, and asked him to go in with them in buying the stock. He said that he negotiated with the former stockholders, and he said that he had nothing to do with Mr. Bentson’s purchase of stock. He said that he believed Mr. Royce made the arrangements for that. He said that he introduced Mr. Bentson and Mr. Royce to Mr. Davidson of American Business Credit Corporation, and Mr. Bentson then obtained a loan.” At the time of the interview Jacob did not recall “what collateral was pledged.” (R. 585.)

The respondent does not do better when he refers to Niederkrome’s so-called “admission” to the revenue agents “that the taxpayers borrowed the \$350,000 from ABC.” (Resp. 46.) Here, too, the respondent is desperately foraging for some bit of evidence where none is available. And here, too, he has been markedly selective in summarizing the testimony of his own witness. He fails to mention what fails to sustain him. As in the case of the evidence concerning E. Royce’s statements, we shall now supply what the respondent has omitted.

Amos testified that he met with Niederkrome more than five years after the purchase of the stock, and that Niederkrome “was just talking from memory” without the aid of any records. (R. 594, 606.) Niederkrome stated that “he had never heard any discussion regarding Mr.

Bentson's interest" and that "he knew Mr. Bentson acquired stock;" but he did not recall "why it happened, and he said, as far as he knew, Mr. Bentson may still own stock in the corporation." (R. 594.) Niederkrome did not recollect "whether stock was put up as collateral for the loan" by ABC-Portland, "but he did know that a loan was obtained and he explained the general financing of the transaction. He said that the new group of stockholders put up four hundred thousand dollars, and they borrowed three hundred fifty thousand dollars." (R. 594-595.)¹ Then Amos immediately corrected himself in his next sentence. We quote this sentence, which the respondent excluded from his brief: "He said he thought that the loan was obtained by the corporation, and he did not know how or when the loan was repaid." (R. 595.) On cross-examination Amos several times repeated that Niederkrome "said he thought" the loan was made to the corporation. (R. 606-607.) Niederkrome later testified that when he met with the revenue agents, he spoke solely from memory. He denied having stated that the loan was made to the corporation. "I think what I told them was that the payment was made by the Oregon Motor Stages." (R. 622.)

Four conclusions emerge from this testimony. First, after more than five years Niederkrome's remembrance of things past was understandably hazy — particularly since his recollection was not refreshed by any documents. Second, if Amos' testimony is correct, at most it indicates that Niederkrome at the time erroneously thought the loan had been made to the corporation. Third, the respondent is relying on one sentence in Amos' testimony, but it is the very sentence which Amos promptly

¹ In paraphrasing these words—which Amos immediately abandoned—the respondent subtly alters them to say that Niederkrome admitted "that the taxpayers borrowed the \$350,000 from ABC." (Resp. 46.) Amos referred to "the stockholders," not to "the taxpayers." At no time did Niederkrome tell Amos that Bentson was not one of the stockholders. Nor did Amos ever intimate that he did.

abandoned. Furthermore, in paraphrasing that discarded sentence, the respondent has revised it so that it harmonizes with his desired conclusion.² Fourth, the testimony does not at all suggest that Bentson was a “straw.” Certainly Niederkrome’s faulty recollection that the corporation borrowed the money — assuming that Amos’ testimony was accurate — sheds no more light on Bentson than on any of the other participants. For that matter, Niederkrome specifically told Amos what the respondent significantly omits in his brief — that “Mr. Bentson acquired stock” in the corporation. (R. 594.)

We conclude that nothing in “the statements of the taxpayers to the revenue agents” impairs the testimony of the petitioners. Our appraisal is fully reinforced by the opinion below. Even the Tax Court did not consider “the statements” as any kind of evidence in support of the result which it reached. “The statements” of E. Royce and Jacob, which the respondent now considers so uniquely material, are not mentioned at all in its findings of fact or in its opinion. (R. 221-244.) And Niederkrome’s alleged “statements” are referred to in the findings merely to indicate that, during his conference with the agents, he “thought the corporation had obtained the loan from ABC.” (R. 232.) They do not enter into the Tax Court’s later analysis of the legal issues. In any case, the Court did not understand Amos’ testimony as the respondent would now read it in accordance with his substantial alteration and omissions.

4. Exhibit A is the third item on which the respondent heavily leans as potent proof that Bentson did not borrow the \$350,000. See pp. 2-3, *supra*. We have argued that Exhibit A was pure inadmissible hearsay, and that in any event it had no probative weight alongside the ample testimony under oath and subject to cross-examination. (Pet. 45-57.) The respondent recognizes that Exhibit A

² See note 1, *supra*.

was plainly inadmissible unless it duly qualified as a routine business entry under the Business Records Act. The exhibit failed to qualify for three basic reasons: (1) despite the petitioners' objections, the respondent did not provide the necessary foundation for its admission (Pet. 48-50); (2) aside from the lack of foundation, the exhibit was not inherently trustworthy (Pet. 50-53); and (3) apart from these inadequacies, the exhibit did not record any "transaction" within the scope of the statute or in controversy here. (Pet. 53-55.) In the light of our arguments the respondent makes several answers. The first is that the taxpayers "admitted the authenticity and identity of this document." (Resp. 52.) The second is that Exhibit A is trustworthy because "corporate minutes are entries made in the routine course of business." (Resp. 52-53.) Then the respondent moves off in a third direction. "In any event," he asserts, "assuming arguendo the correctness of all of the taxpayers' contentions in this respect, the admission of the exhibit was not prejudicial." (Resp. 53.)³ We now consider these answers in the same order.

The respondent does not deny that he failed to lay a foundation for the admission of Exhibit A. Instead he contends that the argument directed to the lack of foundation "is aimed at a point which has been already conceded by taxpayers." (Resp. 52.) Again the respondent is not too attentive to the record. The stipulation of facts between the parties includes two special paragraphs which carefully distinguish between Exhibit A and all other exhibits referred to in the stipulation. (R. 213-214.) The first of these two paragraphs states, "All the exhibits herein mentioned, except Exhibit A, may be offered and received in evidence at the trial . . . without further

³ The respondent states that the "main complaint about the exhibit appears to be that the Commissioner failed to lay a proper foundation for its reception." (Resp. 51.) Evidently the respondent has not entirely understood our position. The argument concerning the lack of foundation is not the "main complaint." It is one of several serious contentions.

identification or authentication; subject, however, to such objections as counsel makes thereto at the trial on the ground of competency, relevancy, or materiality. All said exhibits (except Exhibit A) shall be considered as having been offered and received in evidence in these cases unless objection is made thereto and the objection is sustained." (R. 213.) The second of the two paragraphs provides, "Exhibit A is not attached hereto. Said exhibit may be offered in evidence at the trial . . . without further identification or authentication, subject, however, to any and all other objections as counsel may make thereto at the trial" (R. 213-214.) Hence at the start of the hearing all the mentioned exhibits, other than Exhibit A, were deemed in evidence unless an objection was made and sustained. In sharp contrast, Exhibit A was not attached to the stipulation; it was not in evidence unless it was offered and received; and, if offered, it was subject to any and all objections, including incompetency. (R. 588.) Needless to say, a reservation of the right to object for incompetency embraces hearsay.

In accordance with the stipulation counsel for the respondent affirmatively moved that Exhibit A be admitted in evidence. In offering the exhibit he left no doubt that he expected the petitioners to object. "There is going to — the objection to this instrument will be given by Mr. Jones." (R. 611.) As a result, counsel for the respondent attempted to justify the admission of the exhibit as a record akin to the various records of ABC-Portland already in evidence. (R. 611-613.) Mr. Jones immediately objected "strenuously" to the admission of the exhibit on the ground, among others, that it was "purely hearsay." He expressly distinguished the other documents as involving "payments back and forward;" hence the petitioners "had no objection to and consequently were quite willing to assist the Government by admitting them and putting them to no trouble." Mr. Jones went on to explain that Exhibit A was rank hear-

say which did not qualify for admission. "I want it clearly understood that I have stipulated that I have no objection to the authenticity or to the identity of this thing, but I have strenuous objections on the grounds of materiality and hearsay." He particularly noted that Wixson, who identified the offered exhibit, "was not an officer of the corporation" when "the transaction took place;" that Wixson's affidavit does no more than say that "the photostat there is a true copy of minutes of a certain meeting;" and that the affidavit "attempts to state something about a loan" that "happened ten years before, when he wasn't present or knew anything about it." (R. 613-614.) In reply, counsel for the respondent stated that Exhibit A "is part of the records of the lending institution, and it has genuineness and reliability because of that." (R. 615.) In the wake of these arguments the document was received.

Both in the stipulation and at the trial, then, the petitioners unmistakably served notice that they objected to the admission of Exhibit A because it was pure hearsay. When an objection is made on the ground of hearsay, the proponent has the burden of qualifying the evidence under some **exception** to the hearsay rule. Therefore, Exhibit A was not admissible within the special exception for business records unless the respondent, at the very least, laid the proper foundation required in a court of law. The usual rules of evidence are not suspended in tax cases. The respondent tries hard to overcome the obvious by blandly saying that the petitioners conceded the foundation when they stipulated the "identification or authentication" of the document. (Resp. 52.) But this attempted **exoneration** clearly distorts the purpose and content of the **stipulation**. In conceding the "authenticity" or "identity" of the photostat, the petitioners merely granted that the photostat was a correct copy of the original. The concession was designed to relieve the respondent from the burden of producing and identifying

the original in court. The respondent would now convert this courtesy extended for his convenience into an advance covenant that the photostat was admissible under the business records exception. Indeed, if the petitioners had entered into any such agreement, the explicit reservation of the right to object was utterly pointless. And in distinguishing the routine records of ABC-Portland, Mr. Jones made it clear beyond doubt that in his view Exhibit A did not similarly qualify as an admissible business document. He specifically indicated that the respondent had not produced any witness who "knew anything about it." See p. 11, *supra*. He could scarcely have waived the required foundation if he, too, knew nothing about it.

In order to compensate for the lack of a foundation the respondent further states, "There is no question at all that Exhibit A is a correct copy of the minutes of the meeting in question. And the fact that corporations keep minutes would appear to be subject to judicial notice. Indeed, under the laws of Delaware, the state of incorporation of ABC-Delaware, there is a mandatory requirement that such minutes be kept." (Resp. 51-52.) These observations are quite beside the point. Of course, the petitioners stipulated that Exhibit A included a correct copy of a certain paper found among old records of ABC-Delaware. But as this Court very recently held, "The existence of a document or its presence in the file of a corporation does not, without more, render it admissible under § 1732." Nor are copies admissible simply because they are conceded to be "accurate reproductions." *Standard Oil Company of California v. Moore*, 251 F. 2d 188, 212, 215, n. 34 (9th Cir. 1958). See also Pet. 48-49. The situation here is no better than if Wixson had come to court and identified the writing on the stand. Since he knew nothing about its preparation, it would have been clearly inadmissible. *In re Henry Holzapfel's Sons, Inc.*, 249 F. 2d 861, 864 (7th Cir. 1958). See also Pet. 49. Sim-

ilarly, nothing is gained by saying that corporations keep minutes, and that in Delaware they are required to keep them. Corporations have all sorts of hearsay records, but that alone does not make them competent evidence. Even "under the liberal provisions" of section 1732 "it is necessary at least to submit preliminary evidence" that the purported minutes "were made in the regular course of corporate business, before they can be admitted." *Bruce v. McClure*, 220 F. 2d 330, 336 (5th Cir. 1955). This familiar rule applies to alleged minutes just as it applies to all other records that come out of business files. See, e.g., *Bruce v. McClure*, *supra*; *Spiegel's Housefurnishing Co.*, 2 B. T. A. 158 (1925).

Exhibit A was also inadmissible because it failed to satisfy the critical requirement of trustworthiness. (Pet. 50-53.) The respondent seeks to obviate this inadequacy by stating that "corporate minutes are entries made in the routine course of business. The trustworthiness of the minutes here under consideration is apparent when the circumstances are examined." (Resp. 52.) Here, as we understand it, the respondent is arguing that alleged minutes are conclusively trustworthy records kept in the course of business, though no evidence is produced which shows who prepared them, how they were prepared, and when they were prepared. Although the respondent himself apparently has no knowledge of "the circumstances" in which the minutes were put together, he is not disturbed by the slightest doubt of their reliability. See also p. 11, *supra*. As long as they purport to be minutes, they are supposedly trustworthy. Or as counsel for the respondent argued at the trial, if they are among the corporate records, they necessarily have "reliability because of that." See p. 11, *supra*. This notion of the Business Records Act speaks for itself.

Our discussion of the respondent's views on Exhibit A would be incomplete if we failed to mention this Court's instructive opinion in *Standard Oil Company of Cali-*

fornia v. Moore, supra. In that case a mass of writings, consisting of originals and copies, was offered in evidence. As in this case, it was "not questioned" on the appeal that the copies were "accurate reproductions" or that "the documents came from" business "files and records." The trial court admitted practically all the tendered records "under the hearsay rule which applies to business records." 251 F. 2d at 212. After a thoughtful analysis of section 1732, this Court held that the admission was reversible error. The relevant portions of that opinion are well worth repeating here.

At the outset the opinion emphasizes the basic principle of trustworthiness. "The probability of trustworthiness of memoranda and records made and maintained as provided in §1732 lies in the fact that they are routine reflections of the day-to-day operations of the business in whose files the memoranda and reports are found The matters which reflect the day-to-day operations of a commercial enterprise are those in which it is directly concerned as a participant. Illustrative of these are such matters as bids, offers, purchases, sales, deliveries, price quotations, credit extensions, loans, rentals, salary and wage payments and deductions, inventory charges, and bank deposits." 251 F. 2d at 213. Therefore, "a writing which does not pertain to a matter in which the business was a direct participant, but to some incident, circumstance, or activity outside that business, is not a memorandum or record of an 'act, transaction, occurrence, or event' within the meaning of the statute." In that case the writing is inadmissible even though "it may have been made in keeping with systematic and routine procedures." *Ibid.* A writing, the opinion significantly adds, "cannot ordinarily be considered a 'memorandum or record' of an 'act, transaction, occurrence, or event,' unless the recitals in such writing are factual in nature." While there are "special circumstances under which writings containing expressions of opinion

or conclusions” may be admissible, these are situations where “an opinion or conclusion calls for professional or scientific knowledge or skill,” and “the opinion or conclusion is expressed by one having the required special competence.” *Id.* at 213-214.

The opinion stresses still other important aspects of the statute. “A memorandum or record cannot be considered as having been made in the ‘regular course’ of business, within the meaning of §1732, unless it was made by an authorized person, to record information known to him or supplied by another authorized person.” *Id.* at 214. Again, a memorandum or record is not deemed “made in the ‘regular course’ of business,” within the meaning of the statute, “unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records.” *Id.* at 215. The “procedures” of the company “must provide for systematic or routine entry of such records,” and they must equally “call for timely entry of such records.” *Id.* at 215, n. 34. The Court concluded that the documents were erroneously admitted because their proponent had not discharged the burden of proving such procedures. He made no effort to show that “any systematic or routine procedure” was “followed in the preparation and filing” of the writings, or that “it was a regularly established business procedure to make such memoranda or records” in timely fashion. Hence the writings should have been excluded, for exhibits “unsupported by foundation evidence showing adherence to company procedures calling for prompt preparation of the writing” are “not admissible under §1732.” *Id.* at 215-216.

Though the exhibit here is different from those discussed in the *Standard Oil* case, the principles articulated by the Court similarly apply. Here, as we have already shown in some detail (Pet. 48-50), the record is devoid of any proof that Exhibit A derived from a systematic

procedure assuring a prompt and accurate recording of a business event. Nothing at all is known about the preparation of the exhibit. And, as we have also pointed out (Pet. 50-53), the exhibit has none of the earmarks of reliability which accompany "routine reflections of the day-to-day operations of the business." The respondent complacently assumes on his own behalf that if a writing of a corporation is found in its file, it is therefore admissible. Finally, as the *Standard Oil* opinion thoughtfully explains, in order to be admissible a writing must "pertain to a matter in which the business was a direct participant," and the writing must record some matter of fact which is relevant to the dispute. The question here is not what Davidson may have stated at a meeting within ABC-Delaware or how those present at the meeting may have reacted to what he allegedly said. The question is whether ABC-Portland made a loan to Bentson or to the petitioners. In regard to this issue Exhibit A is wholly inadmissible hearsay. (Pet. 54-55.) It does not purport to record the "act, transaction, occurrence, or event" which is involved here — the loan made by ABC-Portland. Cf. *Lomax Transportation Co. v. United States*, 183 F. 2d 331, 333 (9th Cir. 1950). In conspicuous contrast, the routine business entries of ABC-Portland—which the respondent himself offered in evidence and now conveniently ignores—carry Bentson as obligor on the loan. (Pet. 6-7, 54-55.) If, for some reason, Exhibit A is nevertheless considered a record of the transaction in dispute here, then it is still inadmissible. For ABC-Delaware, the parent of the lender, was not a participant in the transaction. As Wixson's affidavit indicates (Pet. 5a), ABC-Delaware dealt only with ABC-Portland — not with those who obtained loans from ABC-Portland.

At the end the respondent curtly dismisses the Tax Court's admission of Exhibit A as a mere triviality.

Even if the exhibit was wrongly received, "the error was not prejudicial." The Tax Court, he says, "rested its decision upon much more than Exhibit A." The "much more" allegedly consists of the "vagueness of interested witnesses at the time of the revenue agents' investigation," Bentson's "insufficient" net worth, "the securing of all the capital stock of Stages for the loan," and "the signing of the note by E. Royce." (Resp. 53.)

There are three short answers to this plea that the Tax Court's error be forgiven and forgotten — so that the respondent may collect heavy income taxes on \$350,000 despite the error. In the first place, none of the items enumerated by the respondent is a scintilla of proof that Niederkrome, B. Royce, Jacob, or Schneider owned any of the 350 shares or borrowed any of the \$350,000. (Pet. 33-43; pp. 3-8, *supra*.) Similarly, though E. Royce undoubtedly signed the note, the testimony is uncontradicted that he signed as accommodation maker. The additional items which are deemed "much more" evidence are no more illuminating as to E. Royce than they are in regard to the others. (Pet. 43-44.) In the second place, the Tax Court obviously appraised Exhibit A as the critical evidence that was "much more reliable" than the petitioners' testimony, which concededly indicated that "Bentson applied for and was granted a loan of \$350,000 by ABC to provide him with cash to make the purchase." (R. 240-241.) Indeed, it was Exhibit A which led the Tax Court to infer that Bentson could not have been in Portland when the loan was negotiated (R. 241-242) — though Jacob firmly testified that he introduced Bentson and E. Royce to Davidson. (Pet. 34, 39.) In the third place, even if the Tax Court might conceivably have sustained the deficiencies without Exhibit A, that consideration is completely irrelevant. A decision of the Tax Court cannot stand if it is substantially based on inadmissible evidence. "Its action must be measured

by what" it "did, not by what it might have done." Cf. *Securities Commission v. Chenery Corp.*, 318 U. S. 80, 93-94 (1943). It is not for the respondent to tidy up a decision of the Tax Court if that Court has seriously erred. As Judge Denman wrote for this Court, even when there is evidence "which adequately supports" the trial court's conclusions, the judgment must be reversed if the court also used evidence that was "entitled to no consideration." It is immaterial that "the trial court could have made the same finding on the evidence which was properly admitted." *Smallfield v. Home Insurance Co. of New York*, 244 F. 2d 337, 341 (9th Cir. 1957). Cf. *Olender v. United States*, 210 F. 2d 795, 808-809 (9th Cir. 1954); *Hartzog v. United States*, 217 F. 2d 706, 711 (4th Cir. 1954).

Our view of the respondent's effort to revise the decision below is fortified by his method of evaluating evidence. If a taxpayer does not take the stand, the respondent promptly says that his failure to do so creates a serious inference against him. But if the taxpayer takes the stand — as all five petitioners did here — the respondent just as readily disparages the testimony as unworthy of belief because it comes from an interested witness. (Resp. 45.) Apparently, it is impossible to satisfy the respondent. On the other hand, the respondent's own agents are regarded as necessarily disinterested witnesses whose testimony is inherently above suspicion. (Resp. 46-47.)

5. In accordance with this Court's decisions in *Earle v. Woodlaw*, 245 F. 2d 119, 122 (9th Cir. 1957), *cert. denied*, 354 U. S. 942 (1957); and *Pacific Vegetable Oil Corp. v. Commissioner*, 251 F. 2d 682, 683 (9th Cir. 1957), the respondent agrees that "the ultimate question of whether the distribution was essentially equivalent to a dividend" presents a question of law for review. (Resp.

48.)⁴ However, he then adds that "the determination that the taxpayers herein and not Bentson incurred this indebtedness is a simple question of fact and the record is replete with evidence in support of it." (Resp. 48.) The respondent's appraisal of the issues oversimplifies matters.

The Tax Court erred as a matter of law in concluding that the petitioners owned the 350 shares and borrowed the \$350,000. As our examination of the record shows, if we put Exhibit A aside for the moment, there is no proof that Bentson served as a "dummy" or "straw" for the petitioners. (Pet. 33-57; pp. 2-8, 17, *supra*.) In final analysis, the Tax Court was critically influenced by Exhibit A; but even if that exhibit was admissible, the Court was unduly impressed. With respect to Niederkrome, B. Royce, Jacob, and Schneider, the exhibit proves precisely nothing. At most it refers only to E. Royce as a proposed applicant for a loan. (Pet. 36-38.) The Tax Court itself said, on the basis of Exhibit A, "Clearly the loan was made to E. Royce." (R. 240.) However, the exhibit is equally ineffective against E. Royce, though we again assume that it was rightly received. "Mere uncorroborated hearsay" is not "substantial evidence" endowed with the required "rational probative force" to sustain a judgment. *Edison Co. v. Labor Board*, 305 U. S. 197, 230 (1938).⁵

⁴ See also *Northup v. United States*, 240 F. 2d 304, 307 (2d Cir. 1957), which holds that since this issue involves "the application of a statutory rule to found facts," it is "precisely the kind of question it is our function to decide." Cf. *Weible v. United States*, 244 F. 2d 158, 161 (9th Cir. 1957); *Electric Materials Co. v. Commissioner*, 242 F. 2d 947, 949 (3d Cir. 1957).

⁵ In this connection the respondent states: "The taxpayers would have this Court view the stock redemption in a vacuum, without any consideration whatsoever of the long series of interrelated transactions;" and that the Tax Court "refused to adopt the narrow attitude espoused by taxpayers and found it necessary to consider all of the facts involved." (Resp. 44.) These rhetorical observations are mere question-begging. The petitioners are not seeking a decision on the basis of "a vacuum," as distinguished from "all of the facts." The problem here is that the respondent would reject legal proof in favor of surmise and conjecture.

We may appropriately go one step further. The record does not present any conflict in oral testimony; and once Exhibit A is removed, no question of credibility remains. Each of the five petitioners testified clearly and cogently that Bentson bought the 350 shares and borrowed the \$350,000 on his own behalf. None of this testimony was contradicted. Since the witnesses were not "otherwise impeached" and their testimony was not "inherently improbable," it "cannot be disregarded" even though each of the five is "an interested party." *Wener v. Commissioner*, 242 F. 2d 938, 944-945 (9th Cir. 1957). See further *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 340-341 (1933); *Nicholas v. Davis*, 204 F. 2d 200, 202 (10th Cir. 1953); *Indialantic, Inc. v. Commissioner*, 216 F. 2d 203, 205 (6th Cir. 1954); *Sharaf v. Commissioner*, 224 F. 2d 570, 572 (1st Cir. 1955); *Benton v. Blair*, 228 F. 2d 55, 61 (5th Cir. 1955). Besides, their testimony was corroborated by the respondent's own witnesses. See pp. 3-8, *supra*. As a result, the Tax Court's conclusion that Bentson was a mere "straw" cannot stand.

The remaining question on review involves the proper application of section 115 (g). If Bentson owned the 350 shares that were turned in, the distribution in redemption of those shares did not fall within the statute. (Pet. 29-30.) We further contend that the result is the same as a matter of law even if the petitioners, rather than Bentson, are considered the owners of the shares. (Pet. 64-74.)

6. The respondent seems to suppose that once Bentson is disregarded, section 115 (g) inevitably applies. He rationalizes this legal conclusion primarily in terms of three considerations: (1) the pro rata character of the redemption;⁶ (2) the lack of dividend distributions to the petitioners; and (3) the absence of any business purpose for

⁶ The Tax Court, however, held that the redemption altered the relative interests of the stockholders. (Pet. 43.)

the redemption, such as a contraction of the enterprise. (Resp. 54-58.) If we assume for the sake of argument that Bentson can be ignored, the respondent's conclusion scarcely follows as unavoidably as he thinks.

According to the respondent's own regulations, a pro rata redemption is only "generally" considered a distribution equivalent to a dividend. Whether the required equivalence exists "depends" always "upon the circumstances of each case." Regulations 111, § 29.115-9. For the reasons developed in our principal brief, the redemption in the special circumstances of this case was not akin to a dividend — though the respondent's view of Bentson's participation is otherwise accepted as correct. Even on the respondent's understanding of the facts, the net effect was not a distribution of a dividend, but a purchase of the corporate equity less the value represented by the 350 shares. (Pet. 64-74.) The other two factors cited by the respondent are also unimportant in the present context. The dividend history of a corporation is usually relevant because section 115 (g) is concerned with stockholders who would avoid tax by accumulating profits within the corporation and then withdrawing them through a redemption. In such circumstances the lack of dividends in prior years may well be informative. Here, however, the amount distributed does not consist of earnings which the petitioners previously hoarded over the years within the corporate walls. The surplus was accumulated by others. The presence or absence of business purpose is similarly insignificant here. Business purpose is at best relevant because it may indicate that a redemption which is otherwise within section 115 (g) was not a mere device to distribute corporate earnings. Compare, for example, *Earle v. Woodlaw, supra*.⁷ But as we have just noted, even under the respondent's view of the facts, the redemption here is not otherwise equivalent to a dividend.

⁷ But see *Northup v. United States, supra*, at 307.

7. The respondent dismisses our claim that the Tax Court erroneously treated the presumption of correctness as evidence to be weighed in the balance. (Pet. 59-64.) He states that any "attempt to argue that the Tax Court did not consider the Commissioner's evidence but rather relied upon the presumption is to ignore the extensive findings of fact made by the Tax Court." (Resp. 60.) The respondent is answering an argument which we never made. We do not deny that the Tax Court relied in part on what it appraised as persuasive evidence. Our point, rather, is that here, as in *Hemphill Schools v. Commissioner*, 137 F. 2d 961 (9th Cir. 1943), the Tax Court also relied in part on the presumption. It did not derive its conclusion "from the evidence, and from it alone." *Id.* at 964.

II. Hippodrome Amusement Company

1. Here, again, the respondent is somewhat lax in summarizing the evidence. For example, he states that Niederkrome "worked under E. Royce and followed his instructions and orders." (Resp. 61.) The evidence to which he refers (R. 519) relates to the Yellow Cab Company of Portland and not to Hippodrome.⁸ In similar fashion the respondent asserts that E. Royce "simply requested the money and it was given to him, admittedly a normal procedure in the conduct of the affairs of the corporation." (Resp. 61.) No evidence is cited for this colored observation, and understandably so. There is no such evidence in the record. The respondent also infers too much from the record when he says that Hippodrome's "financial and operating condition would have warranted the distribution of dividends." (Resp. 62.) The Tax Court made no such finding. It merely held that the earned surplus was about \$20,000 when the corporation disbursed \$20,000 to E. Royce. (R. 260.) And it did not

⁸ The Tax Court similarly misconstrued the evidence. (R. 258.) However, the Court at least summarized it more accurately.

suggest that the disbursement was artfully designed as a substitute for a dividend. As a matter of arithmetical fact, the corporation did not have enough accumulated earnings to pay a dividend of \$20,000 to E. Royce and proportionately lesser dividends to the other three stockholders.

2. The Tax Court gave two reasons for its refusal to treat the disbursement of \$20,000 as a loan in accordance with the documentary and oral evidence. (R. 262.) We have indicated that neither ground provides an adequate basis for its conclusion. (Pet. 79-81.) It seems that even the respondent is not too pleased with the reasons advanced by the Tax Court; for he has now tried to supply still another ground which never occurred to that Court. The respondent points to the petition of E. Royce, which alleged that Hippodrome was accumulating funds in order to construct a building for Oregon Motor Stages, and that the \$20,000 was loaned to E. Royce until the "building program could be put into effect." (R. 70-71.) He then says that there were no such plans in 1945, when the disbursement was made, and therefore "such a factor was of no relevance whatsoever in determining whether or not a loan was made in 1945." (Resp. 62, 64-65.)

This argument is carefully concerned with the irrelevant. Three witnesses fully summarized the circumstances of the advance and the terms of the advance. Their testimony is uncontradicted, as well as supported by the pertinent records. The absence of a building program in 1945 hardly illuminates the narrow question whether E. Royce intended to repay the \$20,000 and whether he was expected to repay it. A loan by a corporation to a stockholder does not become a dividend because the corporation has not yet definitively decided how to use its funds. It is not surprising that the Tax Court failed to adopt the argument which the respondent now offers. At any rate, the merits of the Tax Court's legal conclusion are to be appraised in the light of the

Tax Court's reasoning. The respondent cannot reconstruct the opinion and then impute the revision to the Tax Court.

3. We gather that the opinion below troubles the respondent in another respect. The Tax Court held that the disbursement of \$20,000 was a dividend, though Hippodrome had four shareholders and three of the four, who owned about 40 percent of the stock, received nothing. No attempt was made to explain how this kind of disproportionate payment resembles a dividend. (Pet. 81-82.) Therefore, the respondent again tries to improve upon the Tax Court's opinion. He cites eight decisions to sustain his view that such a disproportionate withdrawal is a dividend. (Resp. 64.) The decisions, however, do not say what he has attributed to them.

Of the eight decisions, three do not remotely involve the question whether a withdrawal is a loan or a dividend.⁹ The remaining five are *Chattanooga Sav. Bank v. Brewer*, 17 F. 2d 79 (6th Cir. 1927), *cert. denied*, 274 U. S. 751 (1927); *Hadley v. Commissioner*, 36 F. 2d 543 (D. C. Cir. 1929); *Christopher v. Burnet*, 55 F. 2d 527 (D. C. Cir. 1931); *Anketell Lumber & Coal Co. v. United States*, 1 F. Supp. 724 (Ct. Cls. 1932); *Regensburg v. Commissioner*, 144 F. 2d 41 (2d Cir. 1944), *cert. denied*, 323 U. S. 783 (1944). In the *Chattanooga* case the stock was owned by two individuals, and the withdrawals for the year were in exact proportion to their holdings. The Sixth Circuit particularly emphasized that the withdrawals were precisely related to the respective interests, and that the charter prohibited loans to stockholders. In the *Hadley* case there were three stockholders who owned 105, 94, and 1 shares, or a total of 200. The corporation made informal distributions, of which the smallest stock-

⁹ These three are *Cleveland Shopping News Co. v. Routzahn*, 89 F. 2d 902 (6th Cir. 1937); *Paramount-Richards Theatres v. Commissioner*, 153 F. 2d 602 (5th Cir. 1946); *58th St. Plaza Theatre v. Commissioner*, 195 F. 2d 724 (2d Cir. 1952).

holder received $1/200$ while the other two shared the balance equally. The Commissioner determined that the amounts received by the stockholder owning 94 shares were taxable as dividends only to the extent that they did not exceed his proportionate share of the earnings. He conceded that the balance was not a dividend. Moreover, the question in the case was not whether a withdrawal was a loan, but whether a dividend required a formal declaration. In the *Christopher* case the taxpayer was the sole stockholder. In the *Anketell Lumber* case the taxpayers were husband and wife, who owned over 95 percent of the stock and controlled the balance as trustees. The corporation was in liquidation, and they made withdrawals in proportion to their holdings.

Finally, the *Regensburg* decision is no more helpful to the respondent than the other cases which he has so strangely cited. In fact, it indicates that the Tax Court has erred here. The case involved a family corporation organized in 1903. The taxpayers were four brothers, and the taxable years were 1936-1940. During those years the taxpayers and another brother owned 92.5 percent of the stock. See 1 T. C. M. 925, 926 (1943). Over a prolonged period of 38 years the taxpayers withdrew tremendous sums of money. Their respective net balances at the end of 1940 were \$250,053, \$398,919, \$749,388, and \$1,677,671. The withdrawals from year to year "were made at will." 144 F. 2d at 42-43. Or, as the Tax Court summarized the situation, "From the beginning" the taxpayers, "as a practice, had withdrawn" the corporation's "funds on an open running account without regard to the mathematical relation between the withdrawals and their respective shareholdings. The individual withdrawals were at pleasure and without previous consultation among them." 1 T. C. M. at 928.

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In view of this continuing pattern over four decades the Second Circuit held that the withdrawals in 1936-1940 were taxable as dividends. "If the sums withdrawn

were actually intended to be loans," the Court reasoned, "it seems extraordinary that they should have been allowed to roll up for nearly forty years until they reached the staggering total of more than \$3,000,000 owing by persons who had nothing but their shares of stock with which to pay." The alleged indebtedness of each taxpayer "was greater than the value of his shares." In the case of one taxpayer "his debit balance of \$1,677,-671 was greater than the book value of his stock even when computed with" the alleged outstanding loans "included at full value." Noting that the amounts withdrawn were unequal, the Court stated, "Some measure of assurance that the amounts might ultimately be evened up was furnished by" an agreement "which provided that if the shares were sold the seller's indebtedness to the corporation should be taken out of the purchase price. Thus the other shareholders assured themselves of an even distribution of earnings in so far as the value of the shares could effect it." 144 F. 2d at 44. As the Tax Court expressed the same conclusion, "a consistent practice in a family corporation of withdrawing the corporation's earnings on an open account, with only negligible repayments in almost the entire forty years of the corporation's existence, indicates an established method of dividend distribution" 1 T. C. M. at 929.

The respondent's reference to the *Regensburg* case aptly illustrates how far afield he has gone in search of some supporting authority. Here there were no continuing withdrawals at will from one year to another. Here there was no "consistent practice" of removing earnings "at pleasure" from "a family corporation." The recorded loan was no more than an isolated advance by a corporation to a stockholder after due consultation with others who had a stake in the enterprise. The money was to be returned as soon as the corporation needed it. (Pet. 9-11.) However, the *Regensburg* decision is not only easily distinguishable. Even more

important, it pointedly disapproves the reasoning to which the Tax Court resorted here.

The Tax Court justified its conclusion on the ground that the advance of \$20,000 was much less than E. Royce's net worth, and that it was unaware of any "valid or persuasive reason" for a loan. (R. 262; Pet. 79-80.) On the other hand, the Second Circuit emphasized that the withdrawals before it were essentially dividends precisely because they far exceeded the stockholders' net worth. In effect, the Tax Court has reversed the Second Circuit's reasoning. A stockholder's ample ability to return a corporate advance is regarded as a rational basis for treating an advance as a dividend rather than a loan.¹⁰ The departure from the *Regensburg* case does not end there. In the same case the Second Circuit also held that the stockholder's particular purpose in obtaining the loan was immaterial. The Tax Court had allowed Government counsel to establish, on cross-examination, that part of the withdrawals "was used in race-track gambling." 144 F. 2d at 44. The Second Circuit reproved the Tax Court for permitting this inquiry into purpose. "We cannot see," the Court wrote, "that the use which the taxpayers made of the money was relevant to the issue whether it was withdrawn as a loan or a distribution of earnings; whichever it was the taxpayer was privileged to use it as he pleased. Nor do his gambling losses throw light on his intention to repay. Some men will gamble in the hope of getting funds with which to pay their debts, while others will not risk a bet if any debts hang over them." *Id.* at 44-45. In dwelling on E. Royce's reason for obtaining the advance, the Tax Court went clearly astray.

4. The respondent suggests that the question whether the disbursement to E. Royce was a loan or a dividend is merely an issue of fact. (Resp. 63.) This view of the

¹⁰ The respondent, too, persists in this odd reasoning. (Resp. 66.)

matter does not accurately reflect the question before the Court.

As the Supreme Court has said, there are "facts and facts." *United States v. Felin & Co.*, 334 U. S. 624, 639 (1948). "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law." Hence "the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration" on appeal. *Baumgartner v. United States*, 322 U. S. 665, 671 (1944). In short, there is a sharp distinction between "ascertainment of the historical facts" and "interpretation of the legal significance of such facts." *Brown v. Allen*, 344 U. S. 443, 507 (1953). An issue of fact, as correctly understood for purposes of review, involves "findings of primary, evidentiary or circumstantial facts." *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 491 (1937); *Bogardus v. Commissioner*, 302 U. S. 34, 39 (1937). It "does not cover a conclusion drawn from uncontroverted happenings" when the conclusion incorporates legal criteria or standards of judgment. See *Watts v. Indiana*, 338 U. S. 49, 51 (1949). For then the findings "are inescapably enmeshed in considerations that are clearly familiar issues of law." *United States v. Felin & Co.*, *supra*, at 639. See also *Powers v. Commissioner*, 312 U. S. 259, 260 (1941); *Offutt v. United States*, 348 U. S. 11, 15 (1954); *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217, 219 (5th Cir. 1954).¹¹

¹¹ In *Commissioner v. Lo Bue*, 351 U. S. 243 (1956), the Supreme Court recently applied the basic distinction just summarized. The question was whether an employee realized income by exercising options to purchase stock in his corporate employer. The Tax Court held that no income was realized

The record here is free of any evidentiary debate. All the evidence, oral and written, indicates that the disbursement was made as a loan. (Pet. 77-79.)¹² Nevertheless the Tax Court concluded that it was a dividend. And the Court reached this result through the process of applying erroneous criteria of judgment. (Pet. 79-81; pp. 23, 27.) Therefore its conclusion is reversible as a matter of law.

III. Portland Partnership — Dora F. Royce

1. The respondent seems to proceed on the assumption that the concept of partnership in income tax law is different from the concept of partnership in ordinary commercial law. (Resp. 67-68.) But as we have already shown, there is no such distinction. If individuals "are in the same business boat" apart from taxes, "they do not cease to be in it when the tax collector appears." (Pet. 83-84.) Or, as the Tax Court recently agreed with the respondent, for income tax purposes the controlling criteria of so-called family partnerships are the same as those of all other partnerships. See *Beck Chemical Equipment Corp.*, 27 T. C. 840, 848-853 (1957).

2. In our principal brief we contended that Dora qualified as a partner on either of two grounds: (1) she owned a capital interest in the firm (Pet. 89-90); and (2) she contributed services to the firm. (Pet. 90-92.) In an effort to disparage Dora's capital interest the respondent argues that the acquisition of her interest was "contingent upon her joining" the partnership; (Resp.

because the option was granted in order to give him "a proprietary interest in the corporation, and not as compensation for services." The Third Circuit affirmed on the ground that the Tax Court's determination resolved a factual issue and was not "clearly erroneous." *Id.* at 245-246. The Supreme Court reversed because the finding derived from an erroneous legal standard. *Id.* at 247. Cf. *Commissioner v. Culbertson*, 337 U. S. 733, 741-748, 749-750 (1949).

¹² As elsewhere in his brief, the respondent belittles the testimony of three witnesses on the ground that they were "interested." See, however, p. 20, *supra*.

73-74); that there were no specific "business purposes" for having her join (Resp. 74-75); and that E. Royce "controlled the partnership earnings" distributed to her. (Resp. 77-78.) Each of these arguments is what Mr. Justice Holmes called mere "spider's webs inadequate to control the dominant facts." *Myers v. United States*, 272 U. S. 52, 177 (1926).

If Dora's capital interest was otherwise real, it is immaterial that E. Royce expected her to become a partner when he gave her the interest. (Pet. 90, n. 36.) The respondent adds little when he states that E. Royce ultimately decided that she should have an interest. (Resp. 73-74.) Obviously, a donee of property cannot acquire it unless the donor is prepared to part with it. Nor does the respondent move any further when he speaks of so-called "business purpose." It is well settled that an individual may become a partner, through the acquisition of a capital interest or a contribution of services, regardless of whether his becoming a partner enhances the business. (Pet. 88, n. 35.) We are only saying what the respondent himself has said. "There is no requirement that intra-family gifts be motivated by a business purpose, which frequently they would not have, before the donee may be recognized as the owner, for income tax purposes, of the property given to him, and the same is true of other antecedent family transactions." *Mim.* 6767, 1952-1 Cum. Bull. 111, 117, considered at Pet. 88. See also Pet. 86-87, 90, n. 37. As the Sixth Circuit has stated, in referring approvingly to *Mim.* 6767, the "only question is whether the individual has really" made the gift or other transfer. *Henslee v. Whitson*, 200 F. 2d 538, 540 (6th Cir. 1952). See also *Whayne v. Glenn*, 222 F. 2d 549 (6th Cir. 1955), *rev'g* 114 F. Supp. 784 (W. D. Ky. 1953), because the trial court had erroneously required a "business purpose" for a partnership. Unfortunately, the present case is still another example of what too often occurs in taxation. The respondent says

one thing for purposes of administration, and then says exactly the opposite for purposes of litigation.¹³

The respondent's third point is that E. Royce "controlled the partnership earnings distributed to his wife." (Resp. 77.)¹⁴ The evidence merely shows that a number of years after Dora joined the Portland partnership, she loaned E. Royce \$70,000 for investment in a mining project. (Pet. 14-15, 92-93.) Certainly, a loan from a wife to a husband does not establish that the husband had the power to do as he pleased with his wife's estate. (Pet. 92-93.) The respondent attempts to bolster his exaggerated view of the evidence by noting that E. Royce endorsed many of the distribution checks payable to Dora. (Resp. 77.) However, E. Royce fully explained that the bank tellers required his signature on the checks cashed by her. (R. 610.) And, in any event, as the respondent tacitly admits through silence, E. Royce's endorsements did not reflect any actual use or diversion of her share of partnership earnings. The respondent's complaint against Dora's interest as a partner can only begin and end with the one loan made by Dora to her husband. But such a complaint is no legal argument at all. The loan was "made by her with her own money and by her own free choice." Cf. *Nick L. Spada*, 9 T. C. M. 541, 545 (1950). The important consideration is that she was able to do as she pleased. (Pet. 92-93.)

3. Despite the abundant evidence that Dora actively contributed services to the business, the respondent con-

¹³ The respondent insinuates that Dora was made a partner simply to reduce income taxes. (Resp. 75.) There is no such suggestion in the Tax Court's opinion, nor is there an iota of evidence to this effect. E. Royce testified on cross-examination that he gave Dora an interest in the firm because "she was of so much help to me." He "felt morally obligated to do it." (R. 450.)

¹⁴ The respondent errs when he states that Dora's expenditures totalled "no more than \$39,900." (Resp. 77.) He has overlooked her purchase of a Plymouth and a Cadillac, various furnishings for the home, and several hundred dollars' worth of books. (Pet. 14-15.)

tends "that except for occasional discussions with her husband she was never actively engaged in the business." Dora's "interest in the business," he declares, "was no more than that of any wife in her husband's enterprises." (Resp. 76.) There is no need for any detailed analysis of these statements. The evidence to which we have already referred sufficiently disposes of the respondent's understanding of the record. (Pet. 12-13, 90-94.) Until now we had not supposed that serving steadily as a checker of cabs and drivers revealed "no more" than the "interest" of "any wife in her husband's enterprises."¹⁵

The Tax Court did not disagree that Dora rendered services to the business. And it found that the services were the same as those regularly performed by an employee in the business. (R. 272, 277.) It simply refused to recognize the services as valuable, though it had no "knowledge of and experience with the particular subject under consideration." *Boggs & Buhl v. Commissioner*, 34 F. 2d 859, 861 (3d Cir. 1929). See also *Planters' Operating Co. v. Commissioner*, 55 F. 2d 583, 586 (8th Cir. 1932). In so doing, it committed error. (Pet. 90-92.)

4. The respondent states, "In this as in many other fields of taxation it is the substance of the matter which is controlling." (Resp. 69-70.) We have no inclination to question this principle, even though elsewhere the respondent seems reluctant to apply it. (Pet. 66-70.) The "substance" is that Dora acquired an interest in the firm as a partner. Her interest was not a "mere camouflage" which left E. Royce's prior interest un-

¹⁵ The respondent tries to make something of Dora's momentary failure to recall, at one point in cross-examination, some decision made at the business conferences. (Resp. 76, n. 13.) But the evidence is clear that she joined in such conferences. For example, she testified that she participated in a conference concerned with the question of hiring women drivers. She was not in favor of hiring them, but was out-voted. (R. 536.) Furthermore, through her capital interest and her services Dora qualified as a partner, whether or not she also shared in top management and control.

disturbed. See *Commissioner v. Culbertson*, 337 U. S. 733, 746-747 (1949). As this Court has very explicitly declared, partnership income is taxable to "the real owner of the partnership interest;" and "this has always been the law." *Toor v. Westover*, 200 F. 2d 713, 716 (9th Cir. 1952). If Dora had acquired an equivalent interest in a corporate enterprise, her ownership would clearly be recognized for tax purposes. Her ownership was not less genuine because the business was carried on through a partnership. A gift of a corporate interest and a gift of a partnership interest are subject to the same rules. See *Williamson v. United States*, 152 F. Supp. 716, 719 (Ct. Cls. 1957).

5. According to the respondent, the Tax Court's refusal to recognize Dora as a partner presents no more than an issue of fact. (Resp. 80.) Here, too, he has misconceived the scope of the question subject to review here. See pp. 27-28, *supra*. What the parties actually did is, of course, an issue to be resolved by the triers of fact. But the legal effect of their acts — whether Dora acquired an interest as a partner — "is open for determination here unfettered by findings and rulings below except for the weight of the intrinsic authority of all lower court opinions." See Frankfurter, J., concurring in *Deputy v. duPont*, 308 U. S. 488, 499 (1940). The "controlling question" is "one of law." *Lawton v. Commissioner*, 164 F. 2d 380, 383 (6th Cir. 1947). It makes no difference if the legal conclusion is called an ultimate finding. For "it is well settled that such a finding is but a legal inference from other facts and as such is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule." *Lehmann v. Acheson*, 206 F. 2d 592, 594 (3d Cir. 1953). Therefore, the Court is "free to draw" its own "inferences and conclusions" from the "findings of fact." *Western Union Telegraph Co. v. Bromberg*, 143 F. 2d 288, 290 (9th Cir. 1944). See also *United States v.*

Munro-Van Helms Company, 243 F. 2d 10, 12 (5th Cir. 1957).

"There is no significant dispute as to the basic facts pertinent to the decision." *United States v. duPont & Co.*, 353 U. S. 586, 598, n. 28 (1957). The only problem is whether the Tax Court appropriately applied the governing legal criteria. See *Consolidated Naval Stores Co. v. Fahs*, 227 F. 2d 923, 925, 927 (5th Cir. 1955). The Tax Court found that an "adequate" partnership agreement was "drawn up and signed;" that E. Royce gave Dora "capital" which "was turned in;" that she performed services normally rendered by an employee; and that she received her share of the distributions. (R. 272-273, 277.) In concluding that Dora was nevertheless not a partner, the Tax Court erred as a matter of law. (Pet. 94-95.)

IV. Seattle Partnership — Dora F. Royce

1. We have contended that Dora's interest in the Seattle partnership is beyond question because both she and her husband were essentially passive investors. (Pet. 96.) The respondent has not pointed to any error in our analysis. See further p. 38, *infra*.

2. As on the issue involving Oregon Motor Stages, the respondent belittles the testimony of Dora and E. Royce as evidence "of very interested witnesses." (Resp. 76.) We have already commented on this mode of evaluating testimony under oath which stands uncontradicted. See pp. 18, 20, *supra*. Here we need only add that the evidence of Dora and E. Royce was reinforced by the testimony of A. E. Wenck, a disinterested witness who was managing partner of the Seattle firm. (R. 615-618, 621.) Counsel for respondent refrained from cross-examining Wenck (R. 621), and produced no testimony of his own. The Tax Court could not discard "the unimpeached testimony" of the three witnesses. See p. 20, *supra*.

V. Seattle Partnership — Trust for Eunice M. Royce

1. The respondent makes a few arguments which particularly relate to the trust for the benefit of Eunice. One of these arguments is that the trust should not be recognized as a partner because of the broad powers residing in E. Royce as trustee. This contention is no more than a renewed effort to treat the trust as a sham—an untenable position which we have already discussed. (Pet. 102-103.)¹⁶

Our position is further buttressed by the Sixth Circuit's recent decision in *Estate of Hamiel v. Commissioner*, 58-1 U. S. T. C. ¶ 9422, rev'g 15 T. C. M. 1225 (1956). There, also, the Tax Court regarded a trust as a shell, and was seriously criticized for doing so. In that case the grantor established a trust for his minor child. Shortly after the trust was created, the trustee died. No successor was appointed for almost five years. Meanwhile the grantor administered the trust assets. As in the present case, no fiduciary returns were filed, but the grantor "himself filed income tax returns in the name of, and for," the child. Throughout "the period in which no trustee was in existence," the grantor carried the income as an account payable on his books. "The Tax Court found that the assets comprising the corpus of the trust were retained and used by the grantor in a partnership; that they remained under his control and domination; that no fiduciary returns were ever filed for the trust; that no payment was made to the trustee for the use of the assets; that the income was not treated by the grantor as trust income, but as personal income of the minor son; and that, for a long period of time,

¹⁶ The respondent says that the trust instrument "did not require any payment over to Eunice." (Resp. 79.) Eunice had a vested interest in the trust corpus. If the corpus was not paid to her after she became 35, it was to pass to her estate. *Winslow v. Rutherford*, 59 Ore. 124, 114 Pac. 930 (1911). See also *Chase v. Benedict*, 72 Conn. 322, 44 Atl. 507 (1899); *Chauncey v. Francis*, 181 Mass. 513, 63 N.E. 913 (1902); *Taylor v. Richards*, 153 Mich. 667, 117 N.W. 208 (1908).

there was no trustee in existence. These circumstances, the Tax Court declared, warranted a holding that the trust was a sham."

The Sixth Circuit made short shrift of the Tax Court's reasoning. A "valid trust," the Court of Appeals stated, "cannot be invalidated by the unilateral act of the grantor unless he is given that right in the trust instrument — and the grantor did not have that right in the instrument before us." "The beneficiary never agreed to surrender his rights in the trust. The trust was entirely valid at the time of its creation. There was no way in which the grantor, himself, could invalidate it. His retention of the corpus of the trust or its income, or the use thereof, would not result in the trust's being invalid. In such instances, the grantor would become, and would be held a constructive trustee." The Court added, "Even where a settlor of a trust grants himself, as trustee, the same power to deal with the trust property as he possessed before the establishment of the trust, that fact does not empower him to use the trust property for his own personal advantage and gain, so as to render income therefrom taxable to him; and no construction should be placed upon a trust agreement which would impute culpability to the trustee, or destroy the trust instrument itself, unless no other construction is permissible."

The respondent is seeking to do here what the *Hamiel* opinion says he cannot do. He is attempting to disregard a valid trust on the basis of alleged irregularities in its administration. As other decisions have also indicated, the income of a trust is not taxable to its grantor on such grounds. (Pet. 103.)

2. The Tax Court cited a group of cases to sustain its conclusion that the trust did not qualify as a partner. (R. 287.) In our view all these decisions are out of place here. None of them involved a donor-partner who, as in

the present case, was simply an inactive investor in an enterprise managed and operated by others. (Pet. 97-98, 103-105.) In the light of our criticism the respondent now cites three additional decisions in support of the Tax Court. (Resp. 80.) These decisions are *Smith v. Westover*, 237 F. 2d 201 (9th Cir. 1956); *Parker v. Westover*, 248 F. 2d 490 (9th Cir. 1957); and *Harvey v. Commissioner*, 227 F. 2d 526 (6th Cir. 1955). None of the three is concerned with a situation akin to the present context.

The *Smith* opinion dealt with two trusts established by husband and wife for their children. The husband exercised "absolute control of the business." He and the wife could freely fix the amount of their salaries before determining net profits available for distribution. They also retained the power to reacquire the trust interests at book value by withdrawing the trusts from the partnership. 237 F. 2d 202-203. In the *Parker* case the taxpayers were similarly husband and wife, who allegedly transferred 25 percent of their business to their children. The husband "continued as manager of the business," and made all decisions "concerning the management of the enterprise and the withdrawal of earnings." "With a minor exception, all earnings were left to accumulate in the business." To complete the picture, he was the only partner who rendered services to the enterprise, and all the income allocated to the children was earned by him. 248 F. 2d at 491-492. The *Harvey* case involved trusts which a father had created for his children. The Sixth Circuit held that the income of the trusts was taxable to him because he had reserved autocratic control in a non-fiduciary capacity. The Court carefully distinguished the case where the grantor is trustee and is "accountable for the faithful discharge of his trust." Since the grantor was not the trustee, he "was not so accountable." 227 F. 2d at 527.

The situation here was markedly different from the cases just summarized. (Pet. 97-98.) This "is not a case where the father actually earned income by his services and allowed his children to enjoy it." *Estate of A. C. Hewitt*, 9 T. C. M. 383, 386 (1950). E. Royce was but one of ten partners in the Seattle firm. (Pet. 17.) Like the trust, he was only a passive investor. None of the income was attributable to his personal services. Since his interest was but 5 percent (Pet. 95-96), he had no peculiar control over distributions from the partnership. And the trust received its share of the distributions along with the other partners. As the Supreme Court held in *Commissioner v. Tower*, 327 U. S. 280, 288 (1946), the statutes of Congress are "designed to tax income actually earned because of the capital and efforts of each individual member of a joint enterprise." Here the income in question was not attributable to either the "efforts" or the "capital" of E. Royce. See also *T. W. Rosborough*, 8 T. C. 136, 146 (1947); *Edna Jurgensen*, 9 T. C. M. 1027, 1029 (1950).

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

FRED C. NIEDERKROME, E. ROYCE, DORA F. ROYCE,
EZRA ROYCE, B. ROYCE, Estate of ISABELLE H.
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T. JACOB, AGNES C. JACOB, ALBERT L. SCHNEIDER
and BERTHA SCHNEIDER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petitions for Review of the Decisions of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

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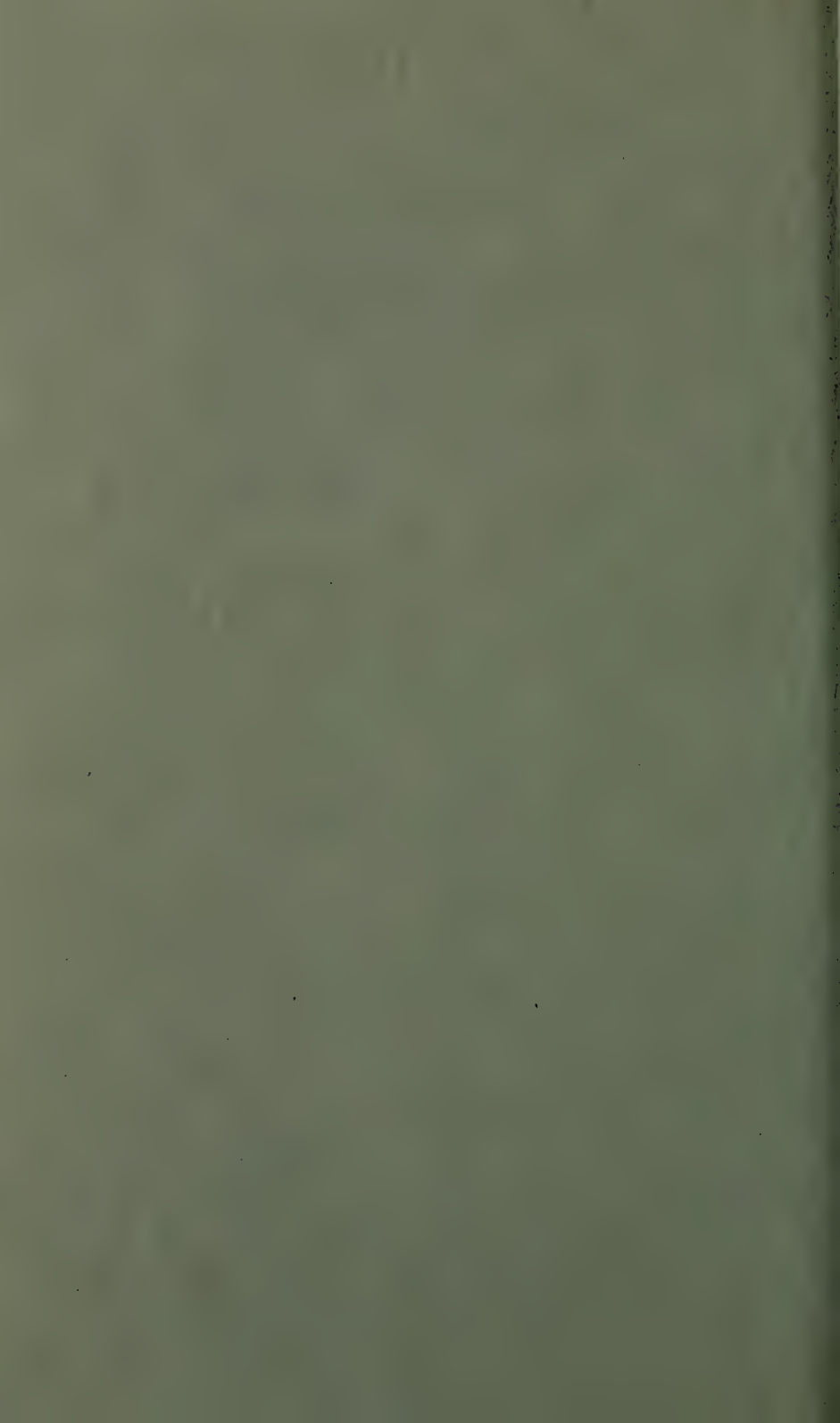
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15724

FRED C. NIEDERKROME, E. ROYCE, DORA F. ROYCE,
EZRA ROYCE, B. ROYCE, Estate of ISABELLE H.
ROYCE, Deceased, B. ROYCE, Executor, ROBERT
T. JACOB, AGNES C. JACOB, ALBERT L. SCHNEIDER
and BERTHA SCHNEIDER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petitions for Review of the Decisions of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court are not officially reported. (R. 216-296.)

JURISDICTION

These petitions for review (R. 303-311) involve federal income taxes. Each notice of deficiency was mailed by the Commissioner of Internal Revenue on September 28, 1953, and in each instance the tax-

payer filed a petition with the Tax Court for redetermination within ninety days thereafter.

Tax Court Docket No. 51491. A notice of deficiency was mailed to the taxpayer Fred C. Niederkrome in the amount of \$32,348.48 and \$1,940.07 penalty for the taxable year 1945. (R. 22-28.) On December 15, 1953, the taxpayer filed a petition with the Tax Court for redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 18-28.) The decision of the Tax Court in favor of the Commissioner was entered on April 3, 1957. (R. 296.) The case is brought to this Court by a petition for review filed July 1, 1957. (R. 303-304.)

Tax Court Docket No. 51526. Notice of deficiencies was mailed to the taxpayer E. Royce and Dora F. Royce in the total amount of \$109,112.16 for the taxable years 1948 and 1949. (R. 40-56.) On December 21, 1953, the taxpayers filed a petition with the Tax Court for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 30-56.) The decision of the Tax Court that there were deficiencies in the total amount of \$44,645.02 was entered on April 3, 1957. (R. 297.) The case is brought to this Court by a petition for review filed July 1, 1957. (R. 304-305.)

Tax Court Docket No. 51527. Notice of deficiencies was mailed to the taxpayer Ezra Royce in the total amount of \$825,924.47 and \$94,609.68 penalties for the taxable years 1944, 1945, 1946 and 1947. (R. 76-103.) On December 21, 1953, the taxpayer filed a petition for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 59-103.) The decision of the Tax

Court that there were deficiencies in the total amount of \$528,697.45 and \$4,882.58 penalty was entered on April 3, 1957. (R. 298). The case is brought to this Court by a petition for review filed July 1, 1957. (R. 305-307.)

Tax Court Docket No. 51528. Notice of deficiencies was mailed to the taxpayer B. Royce in the total amount of \$28,820.62 and \$2,005.84 penalty for the taxable years 1945 and 1947. (R. 124-145.) On December 21, 1953, the taxpayer filed a petition for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 114-145.) The decision of the Tax Court that there were deficiencies in the total amount of \$22,847.30 was entered on April 3, 1957. (R. 299.) The case is brought to this Court by a petition for review filed July 1, 1957. (R. 307-308.)

Tax Court Docket No. 51529. Notice of deficiencies was mailed to B. Royce, executor of the estate of Isabelle H. Royce, deceased, in the total amount of \$51,770.38 and \$2,588.89 penalty for the taxable years 1945, 1946 and 1947. (R. 159-176.) On December 21, 1953, the executor filed a petition for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 149-176.) The decision of the Tax Court that there were deficiencies in the total amount of \$44,134.78 was entered on April 3, 1957. (R. 300.) The case is brought to this Court by a petition for review filed July 1, 1957. (R. 308-309.)

Tax Court Docket No. 51531. Notice of a deficiency was mailed to the taxpayers Robert T. Jacob and

Agnes C. Jacob in the total amount of \$66,977.56 and \$4,035.66 penalty for the taxable year 1945. (R. 185-191.) On December 21, 1953, the taxpayers filed a petition for redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 179-191.) The decision of the Tax Court in favor of the Commissioner was entered on April 3, 1957. (R. 301.) The case is brought to this Court by a petition for review filed July 1, 1957. (R. 309-310.)

Tax Court Docket No. 51533. Notice of deficiencies was mailed to the taxpayers Albert L. Schneider and Bertha Schneider in the total amount of \$24,228.55 and \$1,102.38 penalty for the taxable years 1945, 1948 and 1949. (R. 198-207.) On December 21, 1953, the taxpayers filed a petition for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 193-207.) The decision of the Tax Court that there were deficiencies in the total amount of \$23,450.97 and \$1,102.38 penalty was entered on April 3, 1957. (R. 302.) The case is brought to this Court by a petition for review filed July 1, 1957. (R. 310-311.)

Jurisdiction over each of the above actions is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding that the disbursement of earnings by Oregon Motor Stages in 1945 in payment of the ABC note and the simultaneous redemption of the 350 shares of stock purchased

with the proceeds of such note, together with the disbursements for incidental expenses charged by ABC for making the loan, constituted distributions essentially equivalent to dividends under Section 115(g) of the Internal Revenue Code of 1939 and were therefore taxable to the stockholders.

2. Whether the Tax Court erred in holding that the disbursement by Hippodrome Amusement Company in 1945 was a dividend and not a loan to the taxpayer, E. Royce, and was therefore taxable to him.

3. Whether the Tax Court erred in holding that Dora Royce was not a bona fide member of the Portland and Seattle partnerships and that Eunice (or her trust) was not a bona fide member of the Seattle partnership.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and Regulations involved are set forth in the appendix, *infra*.

STATEMENT

This case involves several consolidated proceedings. After trial based upon considerable oral testimony and stipulations of the parties the Tax Court entered a memorandum opinion. The findings of fact contained therein are as follows:

1945 disbursements by Oregon Motor Stages from surplus account

The Oregon Motor Stages (hereinafter called Stages) was organized as an Oregon corporation in 1931, and in 1945 was the largest intrastate bus company operating in Oregon. Stages operated its

motor busses as a public carrier pursuant to a permanent franchise under the rules and regulations of the Interstate Commerce Commission. In June, 1945, the issued and outstanding capital stock of Stages consisted of 750 shares of common stock. (R. 221.)

During April or May, 1945, Schneider, after contacting the stockholders of Stages, advised E. Royce that all the stock of the corporation was for sale. Promptly thereafter, E. Royce and Jacob entered into discussions with various individuals and the stockholders in regard to the purchase of the stock based upon a price of \$1,000 per share. As a result of the negotiations, they and B. Royce, Niederkrome and Jacob expressed a willingness to purchase a total of 400 shares. Negotiations were conducted with other individuals concerning the purchase of the remaining 350 shares of the stock but they declined to participate in the venture. In addition, consideration of giving Stages an option to purchase the 350 was developed to the point of drafting an agreement for that purpose. (R. 222.)

During the middle or latter part of June, 1945, L. R. Bentson visited Portland and was consulted about the venture. Bentson, born in 1869, was an American citizen and resided in Canada after 1906. He was an uncle of E. Royce, B. Royce and Fannie Orsen, whom he visited about once a year during a stay of four or five days in Portland. He was not a man of expensive habits or a lavish spender and lived modestly with his wife in a small house in Vancouver, D. C., which was valued at \$4,200 at the time of his death in April, 1950. He left an estate

of \$33,673.06 to Fannie Orsen. He owned a house and garage in Vancouver, which he rented in 1945 for \$20 and \$12 per month, respectively. Bentson invested small amounts of money in Canadian securities and made regular small deposits to his bank account, which, on August 14, 1945, aggregated \$6,539.42. What funds he had were said to be blocked by wartime restrictions in Canada. (R. 222-223.)

Prior to June 20, 1945, application for loan of \$350,000 was made by E. Royce to American Business Credit Corporation, an Oregon corporation doing business in Portland, Oregon (hereinafter called ABC-Portland). The application was duly submitted to the parent company, American Business Credit Corporation (hereinafter referred to as ABC-Delaware), a Delaware corporation, at its offices in New York City, for approval.¹ (R. 223.) The application for loan of \$35,000 was considered by the Executive Committee of the parent company on June 20, 1945, the pertinent portion of the minutes of which committee reads as follows (R. 223-224):

Mr. Davidson and Mr. Ebe then submitted an application on behalf of ABC-Portland. A group of outstanding individuals in Portland, headed by Messrs. Barney & Roy Royce and Robert Jacob, desire to purchase the entire capital stock of Oregon Motor Stages, largest intra-state bus company operating in Oregon. Capital stock consists in all of 750 shares Common, par value \$100.00 per share, book value \$537.00 per share.

¹ ABC-Portland was dissolved or abandoned about 1949 and its records transferred to the main office of the parent company in New York.

The stock is to be acquired for a price of \$750,000. The purchasers intend to buy 400 shares for \$400,000, with their own funds. They ask that we extend a line of credit of \$350,000, the balance of the purchase price of the Oregon Motor Stages stock. We are asked to lend Mr. Roy Royce, personally, the sum of \$350,000, on his note, to be secured by all of the capital stock of Oregon Motor Stages. Our loan to be repaid in 90 days or adjusted as conditions warrant. Mr. R. Royce's personal statement reflects a net worth of \$1,366,000.00. Retiring stockholders will guarantee to R. Royce and his associates that the worth of Oregon Motor Stages is not less than the figure shown on the company's 4/30/45 statement. A fee of \$5,000 plus 5% per annum on cash for every 90 days is charge contemplated.

The Committee reviewed in detail the financial condition of Oregon Motor Stages as of 12/30/44 and 4/30/45 and its operating results for 1944. Mr. Davidson was questioned in respect to the proposed transaction and Mr. Dick's opinion was received. After consideration and full review, the Committee unanimously approved the credit line requested, subject to approval of counsel, and the sollowing [sic] stipulations:

1. Subject to unanimous approval of full Portland Committee.

The sale and puhchase of the 750 shares of capital stock of Stages was consummated on July 2, 1945, at which time the former shareholders transferred 750 shares of stock in such manner that each of the taxpayers named and L. R. Bentson received certificates for the number of shares indicated (R. 224-225):

Niederkrome	55
E. Royce	145
B. Royce	50
Robert T. Jacob	100
A. L. Schneider	50
L. R. Bentson	350
	<hr/>
Total	750

All of these certificates of stock were immediately endorsed in blank and turned over to a representative of ABC to secure the loan from that company of \$350,000, Bentson giving his receipt to each of the others for their respective stock certificates, "such stock being loaned to me to be pledged to American Business Credit Corporation as collateral to loan this day made to me for the purchase of Three Hundred Fifty (350) shares of the common capital stock of said company." On the same date, July 2, 1945, ABC issued its check for \$350,000 payable to L. R. Bentson and E. Royce. (R. 225.) The payees in turn executed a note dated July 2, 1945, in the amount of \$350,000, secured by all of the capital stock of Stages, and reading as follows (R. 225-227):

\$350,000.00 Portland, Oregon, July 2, 1945.

On or before ninety (90) days after date, for value received, we, jointly and severally, promise to pay to the order of AMERICAN BUSINESS CREDIT CORPORATION Three Hundred Fifty Thousand and no/100 (\$350,000.00) Dollars, with interest from date hereof, payable monthly on the first day of each month thereafter, at the rate of 5 per cent per annum. Principal and interest payable in lawful money of the United States of America at the office of American Business Credit Corpora-

tion, Pacific Building, Portland, Oregon; and as collateral security for the payment of this note we, jointly and severally, herewith deposit and pledge with said American Business Credit Corporation 750 shares of the capital stock of Oregon Motor Stages, an Oregon corporation, evidenced by the following certificates: certificate 72 for 145 shares; certificate 73 for 100 shares; certificate 74 for 55 shares; certificate 75 for 50 shares; certificate 76 for 50 shares and certificate 77 for 350 shares; and we, jointly and severally, empower said American Business Credit Corporation, with option as to time and manner, to collect or sell and deliver all or any part of said capital stock and the certificates evidencing the same, with or without notice to us, or either of us, and to apply the proceeds thereof to the payment of this note with all interest due thereon, and to the payment of all expenses attending the sale or protesting of the said collateral; and in case the proceeds of the sale of said collateral shall not cover the principal, interest and expenses we, jointly and severally, promise to pay the deficiency forthwith after such sale; and in case suit or action is commenced to collect this note or any portion thereof, we, jointly and severally, promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in any such suit or action.

/s/ L. R. BENTSON

/s/ E. ROYCE

On July 17, 1945, George W. Davidson, manager of ABC-Portland, billed Stages for \$4,315.07, an amount which represented the ABC servicing fee for

financing the loan. The invoice was okayed by E. Royce and on July 19, 1945, Stages issued its check in full payment. The payment was charged to an expense account on the books of Stages. (R. 227.)

Two months later, on or about August 31, 1945, Stages received a letter dated August 31, 1945, signed by L. R. Bentson, reading as follows (R. 227-229):

Vancouver, B. C.
August 31, 1945

Oregon Motor Stages,
Portland
Oregon

Gentlemen:

I hereby offer to sell to Oregon Motor Stages my Three Hundred Fifty (350) shares of stock in the Company for cash at the price of One Thousand Dollars (\$1,000.00) per share, total price Three Hundred Fifty Thousand Dollars (\$350,000.00). You are to have thirty days in which to close the transaction, but it is understood between us that you will make every reasonable effort to do so within a lesser time.

I represent and warrant that my 350 shares of stock are free and clear of encumbrances, save and except for a note in the sum of \$350,000.00 payable to the American Business Credit Corporation and the transfer will be made upon the sole condition that your Company assume and pay the amount of interest that is due and owing from me to said corporation on account of this note.

My object in desiring to dispose of this stock is that the sudden end of the war has made a great difference in my plans, and on this account I de-

sire to be relieved of my obligation to the said American Business Credit Corporation.

Very truly yours,

/s/ L. R. BENTSON

August 31, 1945.

The above offer is hereby accepted.

OREGON MOTOR STAGES

By /s/ E. ROYCE,

President.

A joint and special meeting of the stockholders and directors of Stages was held on September 5, 1945, at which time such letter was considered. Bentson was one of the stockholders present at the meeting, the minutes of which meeting read in part as follows (R. 229-231):

The President, E. Royce, presided and Secretary Robert T. Jacob kept a record of the proceedings.

Consideration was then given to the written offer of stockholder, L. R. Bentson, dated April 31, 1945, copy of which is attached to these minutes.

The president then canvassed each and every stockholder present, either in person or by proxy, and each and every share of stock present, either in person or by proxy, except the 350 shares owned by stockholder, L. R. Bentson, expressly waived the right to sell their shares to the corporation.

Thereupon consideration was given to the applicable Oregon statutes and the balance sheet of

the Company as at August 31, 1945 which the President submitted to the meeting was inspected, and thereupon the following resolutions were adopted by the unanimous vote of 400 shares of stock of the Company, stockholder L. R. Bentson, at his request, being excused from voting:

WHEREAS, express power is given in the Articles of Incorporation of this Company to purchase its own stock; and

WHEREAS, this Company has a surplus substantially exceeding \$350,000.00, and it is to the best interests of the Company to use \$350,000.00 of such surplus to retire 350 shares of its issued and outstanding capital stock at a price of \$1,000.00 per share and to use \$350,000.00 of such surplus for such purpose; and

WHEREAS, such purchase may be made without injury to the existing creditors and all of the stockholders of the Company, except stockholder L. R. Bentson, have waived their priority and have consented that the 350 shares belonging to L. R. Bentson shall be so purchased and retired; and

WHEREAS, said stock so purchased should be cancelled and the capital stock of the Company reduced in the amount of \$35,000.00, Now, Therefore,

BE IT RESOLVED: That this Company shall purchase and retire 350 shares of stock belonging to L. R. Bentson at the price of \$1,000.00 per share out of its surplus, and that the stock so purchased shall be cancelled; and

FURTHER RESOLVED: That the capital stock of this Company be reduced from \$75,000.00, divided into 750 shares of the par value of \$100.00 each, to \$40,000.00 divided into 400 shares at the

par value of \$100.00 each, and that the Secretary be and he is hereby instructed and directed to file with the Corporation Commissioner of Oregon an appropriate certificate and affidavit of such reduction in capital stock, as required by law.

On September 6, 1945, Stages purchased and retired the 350 shares of capital stock, and on the same date issued its check in the amount of \$350,000, payable to L. R. Bentson. The check was endorsed by Bentson and delivered to ABC-Portland in payment of the loan. The payment of \$350,000 was recorded on the books of Stages as a debit to surplus of \$315,000 and a debit to capital stock of \$35,000.² On September 17, 1945, Stages issued its check in the amount of \$3,739.73 to ABC-Portland, for interest due and owing on the loan of \$350,000. This payment was charged to interest expense on the books of Stages. (R. 231.)

Bentson did his own bookkeeping. In his day book Bentson listed in detail items of income and expense, and purchase and sale of securities. It contained numerous entries on stocks purchased and sold by him during the ensuing years, including the year 1945. It did not contain any entries reflecting the purchase or sale of Stages stock in 1945. (R. 231.)

Bentson was neither an officer nor a director of Stages, and he did not participate in the operation of

² On April 2, 1946, the Corporation Commissioner of the State of Oregon issued to the corporation its certificate of decrease in the capital stock of the corporation from an authorized capital stock of \$75,000 to an authorized capital stock of \$40,000. (R. 231.)

the corporation. Schneider was general manager, vice president and director, and the only one who was actually active in the company's affairs. Jacob was secretary and director. E. Royce was president and director. Niederkrome was treasurer and director. E. Royce, Jacob and B. Royce paid for their Stages stock out of their own funds. Schneider paid for his 50 shares with his own money, although E. Royce advanced him \$50,000 for the purpose for a few days. E. Royce advanced Niederkrome \$55,000 for his 55 shares, and Niederkrome gave him a note for \$55,000. On June 20, 1946, Niederkrome transferred his 55 shares to Schneider at the same price. Schneider paid several thousand dollars on account of the stock and gave a note to E. Royce for the balance. Niederkrome's unpaid note to E. Royce was cancelled, and Schneider's note remained unpaid until the subsequent liquidation of Stages, when a compensatory offset was made against it as among the stockholders. (R. 231-232.)

During the Commissioner's investigation, Niederkrome confided to the revenue agents that he thought the corporation had obtained the loan from ABC. When the stock in the name of Bentson was offered for sale to Stages on August 31, 1945, no serious effort was made to interest other purchasers in buying the stock. The availability of the stock for sale in September of 1945 was communicated by Schneider to one of the individuals formerly interested in buying it and Schneider was informed by this individual that he was no longer interested. (R. 232.)

Stages was in good financial condition in 1945 and had a very fine earning record. It had paid substantial dividends in the years prior to 1945. Although its bus equipment was becoming somewhat worn, due to the wartime conditions, it had a large reserve available for the purchase of additional equipment; it was doing an excellent business; its gross earnings were in excess of \$1,000,000 per year, and in two years were in excess of \$2,000,000. The taxpayers were optimistic about the post-war future of Stages. It was their opinion that the company would prosper after the war, despite an expected decline in revenues as a result of the loss of military business. They thought that wage rates would be reduced, and the population of Oregon doubled, within the next ten years. They regarded Stages as a very profitable venture, one which presented an excellent opportunity for a good, solid bus operation. Stages had an earned surplus in excess of \$350,000 at the time of the stock redemption on September 6, 1945. (R. 233.)

There was no diminution of or curtailment in the corporate activity and business of Stages as a result of the stock redemption. The corporation continued to operate under its permanent franchise under the Interstate Commerce Commission, and it continued to serve the people who desired to use its facilities. (R. 234.)

In 1945, Stages expended cash and incurred a long-term obligation of \$90,000 for the purchase of new bus equipment costing \$179,940.71, of which cost \$155,945.71 was expended prior to taxpayers' and Bentson's acquisition of Stages stock. In 1945, also,

depreciation on Stages' equipment amounted to \$119,564.23, and busses costing \$74,404.12, having a depreciated basis of \$3,877.87, were sold for a net profit of \$18,903.83. In 1946, Stages purchased new bus equipment costing \$183,009.33, and increased its long-term obligations to \$155,000. Depreciation on Stages' equipment in 1946 amounted to \$124,673.58, and busses costing \$148,951.47, and having a depreciated basis of \$700, were sold for a net profit of \$44,565.81. During 1947, Stages acquired new bus equipment costing \$147,862.99 and a new building costing \$103,390.33; it increased its long-term obligations (equipment) to \$184,934.91; and it incurred a new long-term obligation (building) of \$71,000. Depreciation on Stages' equipment in 1947 amounted to \$138,637.85 and busses costing \$56,722.11, and having a cost basis of \$450, were sold for a profit of \$9,990.24. (R. 234-235.)

The gross revenues and cumulative undivided profits of Stages for the years 1945 to 1948, inclusive, were as follows (R. 235):

<u>Year</u>	<u>Revenues</u>	<u>Cumulative Undivided Profits at End of Year</u>
1945	\$2,387,331.82	\$102,469.34
1946	1,802,712.13	202,356.07
1947	2,072,584.49	236,983.53
1948	1,756,559.03	218,500.09

Stages did not declare or pay dividends to its stockholders in 1945 and 1946, or in any other year under the operation of the taxpayers. The taxable net income of Stages for 1945 and 1946 was \$426,885.28

and \$153,318.31, respectively. In answer to Question No. 8 on the income tax return of Stages for the year 1946 concerning the retention of over seventy per cent of the earnings and profits, the following reason was given (R. 235) :

Company is replacing equipment badly worn through the war use and is buying other equipment to better service. Needs all funds for further expansion.

The Tax Court found that the record failed to overcome the determination of the Commissioner that Bentson was not a bona fide participant in the transactions leading up to the acquisition of Stages stock and was not a bona fide stockholder in Stages at all times material. It was further found that the Commissioner's determination that the corporate distributions by Stages, in retirement of the 350 shares of its stock issued in the name of Bentson and in payment of certain incidental expenses, were made at a time or under such circumstances as to be essentially equivalent to dividends taxable to Niederkrome, E. Royce, B. Royce and wife, Jacob and wife, and Schneider and wife is not overcome by the evidence of record. (R. 236.) From these determinations the taxpayers here petition for review.

The disbursement by Hippodrome

The Hippodrome Amusement Company was an Oregon corporation engaged in the business of renting property at Seaside, Oregon. It owned two pieces of property in the center of the city, one improved, the

other unimproved. Most of the improved property was devoted to rental purposes, and the balance, in 1945, was used as a dance hall. (R. 257-258.) In 1945, the issued and outstanding stock of the corporation was owned as follows (R. 258):

E. Royce	218	shares
B. Royce	111	"
Niederkrome	19	"
Stephen Bartle	5	"
<hr/>		
Total	353	"

The first three persons above listed were directors. E. Royce, the only taxpayer concerned in this issue, was president and Niederkrome secretary and auditor of the corporation. The latter worked under the former and, to a considerable extent, followed his instructions and orders. (R. 258.)

On December 28, 1945, Hippodrome issued a check payable to E. Royce in the amount of \$20,000. This payment was recorded on the corporate books by debiting an account receivable, entitled "Due from Stockholders," and crediting the cash account. The disbursement of \$20,000 to E. Royce was made with the consent and agreement of B. Royce and Niederkrome. There were no minutes of the corporation authorizing such payment. E. Royce executed no note or other evidence of indebtedness, he paid no interest at any time, and to the time of the hearing had made no repayment. E. Royce has at all times been financially able to repay the amount withdrawn by him. His personal financial statement in 1945 reflected a net worth of \$1,366,000. He had large investments in

many business enterprises. In 1945, E. Royce loaned Niederkrome \$55,000, advanced Schneider \$50,000, and invested \$145,000 in stock of Stages. Later he financed the development of a gold mine called Alder Gold-Copper Company, promoted the sale of its stock, and obligated himself to supply the company with \$250,000. In 1945, he reported a net income of \$122,951.95, which included earnings of \$113,530.63 from five partnerships, namely, Yellow Cab Company of Seattle, Gray Line Motor Tours of Seattle, Yellow Cab Company of Portland, Royce Brothers of Portland, and Queen City Garage of Seattle. (R. 258-259.)

In 1948, Hippodrome disbursed \$400 to Niederkrome which was also charged to the account receivable entitled "Due from Stockholders." Similarly, as in the case of E. Royce, there were no corporate minutes authorizing the payment; he executed no note or other evidence of indebtedness; he paid no interest at any time; and there has been no repayment. (R. 259.)

On April 1, 1954, Niederkrome opened new accounts on the books of Hippodrome entitled "Notes Receivable—E. Royce" and "Notes Receivable—F. C. Niederkrome," to which he debited \$20,000 and \$400, respectively, at the same time crediting the "Due from Stockholders" account with \$20,400, thus closing out such account. (R. 259-260.)

Hippodrome operated at a loss before the war and carried a deficit for about ten years during the 1930's. In the early years it was necessary for E. Royce and B. Royce to advance moneys to the company at times

to help it out. The financial and operating condition of the company improved thereafter and, in the years before 1945, an earned surplus was built up, and funds were accumulated. The company continued to prosper in 1945 and the years subsequent thereto, and is presently a company in good financial standing with a book net worth of \$70,000, the fair value of which is probably \$140,000. Hippodrome operated on the basis of a fiscal year ending March 31. On March 31, 1945, the earned surplus was \$16,576.34. It had earnings of \$5,127.06 from operations during the year ended March 31, 1946. The earned surplus on March 31, 1946, was \$21,703.40. There was no formal declaration of dividends by Hippodrome in December, 1945. (R. 260.)

Hippodrome Amusement Company had no building program or plans for immediate expansion in 1945. Its plans for the remodeling of its buildings, or for the construction of a building on the vacant portion of its property, were not conceived or developed until 1948 or 1949. (R. 260.)

The Tax Court found that the withdrawal of \$20,000 by E. Royce in 1945 was not a loan to him by Hippodrome, but was a distribution out of the profits taxable to him as a dividend. (R. 261.)

Yellow Cab "Partnerships"—E. Royce and Dora Royce

Prior to August 1, 1942, Yellow Cab Incorporated was an Oregon corporation engaged in the operation of a taxicab business in Portland, Oregon. On August 1, 1942, the corporation was liquidated and dissolved. On the same date, a partnership under the name of

Yellow Cab Company (hereinafter called Portland partnership) was formed to operate the business formerly conducted by the corporation. On July 31, 1942, immediately prior to the dissolution of the corporation, E. Royce transferred 14,000 shares of the corporate stock to his wife, Dora F. Royce. This transfer represented slightly less than half of the shares of stock formerly held by him. The transfer of the stock to Dora was made in anticipation of the planned dissolution of the corporation and the simultaneous formation of the partnership, and the purpose of the transfer was to qualify Dora for admission to the partnership. (R. 263.)

The Portland partnership agreement provided that the interests of the respective parties would be as follows (R. 265):

E. Royce	26.1575%
B. Royce	26.1575%
Charles W. Keffer	.659 %
C. H. Luton	.906 %
Dora F. Royce	23.06 %
Isabelle H. Royce	23.06 %

Profits and losses were to be borne in the proportion of the above interests. Each of the parties was to have an equal voice in the control and operation of the business. (R. 265.)

Luton and Keffer were employees, and their small partnership interests were purchased by E. Royce and B. Royce on November 28, 1942. (R. 266.)

Prior to April 20, 1944, Yellow Cab Company of Seattle was a Washington corporation engaged in the operation of a taxicab business in Seattle, Washing-

ton. The issued and outstanding shares of stock of the corporation were owned as follows (R. 266) :

W. L. Rothschild	607½
J. A. Baldi	606
Geo. E. Worster	606
D. N. Newton	606
E. Royce	1,402½
B. Royce	1,402½
A. H. Wenck	269
<hr/>	
Total Shares	5,500

On May 1, 1944, the Yellow Cab Company was liquidated and dissolved. On the same date, May 1, 1944, a partnership of the same name (hereinafter called Seattle partnership) was formed to operate the business formerly conducted by the corporation. (R. 266-267.)

On April 20, 1944, immediately prior to the dissolution of the Seattle corporation, E. Royce transferred 402½ shares of the corporate stock to his wife, Dora F. Royce. At the same time he transferred 700 shares of the stock to himself as trustee for his minor daughter, Eunice Royce, then fourteen or fifteen years of age. He retained 300 shares of stock for himself. On the same date, April 20, 1944, E. Royce executed a declaration of trust by which he declared himself trustee of the 700 share of stock in trust for Eunice Royce. The transfers of the stock to Dora F. Royce, and to himself as trustee for Eunice Royce, were made in anticipation of the planned dissolution of the corporation and the simultaneous formation of the partnership, and the purpose of the transfers of stock was to qualify Dora and the trust for admission to the

partnership. Gift tax returns were filed covering the gifts of stock in the Seattle corporation to both Dora and the trust. (R. 267.)

The Seattle partnership agreement provided that salaries and distribution of the profits were to be made as follows (R. 269-270):

Salaries: A. H. Wenck, a monthly salary to be determined by partners

B. Royce and E. Royce, $2\frac{1}{2}\%$ of net profits, but not exceeding \$5,000 per annum

Profits:

B. Royce	1402 $\frac{1}{2}$ /5500ths
E. Royce	300 / 5500ths
E. Royce, Trustee for Eunice M. Royce	700 / 5500ths
Dora Royce	402 $\frac{1}{2}$ /5500ths
A. H. Wenck	269 $\frac{1}{2}$ /5500ths
W. L. Rothschild	485 $\frac{1}{2}$ /5500ths
J. A. Baldi	485 / 5500ths
G. E. Worster	485 / 5500ths
D. N. Newton	485 / 5500ths
L. S. Ackerman	485 / 5500ths

Any losses were to be borne in the same proportion as the profit distribution. (R. 269-270.) Decisions on partnership matters were to be made by a majority in interest of the partners. (R. 269.)

The Portland partnership and the Seattle partnership kept their books and prepared their tax returns on an accrual basis of accounting during all the years in question. E. Royce was the most active partner in the Portland partnership. He made the important decisions as well as the day-to-day decisions involved in the operation of the business. He was in charge of

the office, and his supervision and management included the shop and garage personnel. B. Royce was relatively inactive. Niederkrome was accountant for the Portland partnership. Dora devoted some time to checking the drivers and cars at the stands, boats, depots and any place in Portland where the cabs came frequently to pick up or discharge passengers. She also checked the appearance and condition of uniforms, cleanliness, number of passengers carried and made written reports on these matters to the office. On Schedule I of the partnership returns filed by the Portland partnership for the years 1946 through 1949, no percentage of time devoted to the business by Dora is indicated. Duties similar to those rendered by Dora for the Portland partnership were rendered by an employee of the Seattle partnership for that firm. (R. 271-272.)

The drawing accounts of Dora and E. Royce on the books of the Portland partnership show withdrawals during the taxable years 1944 through 1947, as follows (R. 272) :

<u>Year</u>	<u>Dora F. Royce</u>	<u>E. Royce</u>
1944	\$ 48,777.75	\$ 58,184.94
1945	69,180.00	80,820.00
1946	48,865.01	57,086.99
1947	4,612.00	5,388.00
	<hr/>	<hr/>
Total	\$171,434.76	\$201,479.93

The withdrawals of both from the Seattle partnership during the years 1945 through 1949 were as follows (R. 272-273) :

<u>Year</u>	<u>Dora F. Royce</u>	<u>E. Royce</u>
1945	\$41,622.53	\$30,994.97
1946	19,662.53	14,644.97
1947	12,342.53	9,194.97
1948	12,342.53	9,194.97
1949	5,022.53	3,744.97
	<hr/>	<hr/>
Total	\$90,992.65	\$67,774.85

At the end of 1947, the Portland partnership's accumulated earnings distributable to Dora exceeded her withdrawals by \$35,434.76, and those distributable to E. Royce exceeded his withdrawals by \$38,395.26. At the end of 1949, the Seattle partnership's accumulated earnings distributable to Dora and E. Royce exceeded their withdrawals by the amounts of \$18,733.16 and \$14,008.75, respectively. (R. 273.)

The foregoing withdrawals by Dora were in the form of checks made payable to her. Checks so issued to her by the Portland partnership in 1944, in the aggregate amount of \$48,777.75, were endorsed in blank. Another check so issued to her by the Portland partnership on February 23, 1945, in the amount of \$11,530, was also endorsed in blank by Dora and paid by the drawee, the United States National Bank, on April 3, 1945. All other checks issued to Dora by the Portland partnership and all those issued to her by the Seattle partnership, totaling \$170,479.59, were endorsed in blank both by her and by E. Royce. (R. 273.)

During the year 1944 and through July of 1945, Dora maintained a checking account at the Sixth and Morrison Branch of The First National Bank of

Portland in the name of "Mrs. E. Royce." Beginning with August, 1945, the account was in the name of "Dora F. Royce." (R. 273-274.) The deposits to and withdrawals from this account for the years 1944 through 1947 were as follows (R. 274):

<u>Year</u>	<u>Deposits</u>	<u>Withdrawals</u>
1944	\$ 21,386.75	\$ 22,507.83
1945	38,712.25	36,114.11
1946	73,491.78	71,563.02
1947	46,485.00	50,106.19
Total	<hr/> \$180,075.78	<hr/> \$180,291.15

The foregoing deposits represented some of the distribution checks above mentioned. Dora also had occasion to use a safe deposit box during each of the taxable years, into which were placed various amounts of cash derived from such distributions. The balance in the account on January 1, 1944, was \$2,242.57 and on December 31, 1947, \$2,648.91. (R. 274.)

A substantial portion of the partnership earnings distributed to Dora by both partnerships was expended in payment of state and federal taxes. The amounts so expended by Dora for federal taxes for the years 1944 to 1947 were as follows (R. 274):

<u>Year</u>	<u>Amount</u>
1944	\$ 29,793.72
1945	57,315.46
1946	51,721.22
1947	29,454.14
Total	<hr/> \$168,284.54

Dora filed joint returns with E. Royce for 1948 and 1949, and taxes were paid in the amounts of

\$28,230.87 and \$17,522.44, respectively, or a total of \$45,753.31. (R. 275.)

A portion of the distributions made to Dora by both partnerships was expended by her for such items as (R. 275) :

<u>Item</u>	<u>Approximate Cost</u>
2 Fur Coats	\$1,850
2 Chrysler Autos	8,000
Plymouth and Cadillac	Unknown
Exercycle	350
Silverware	1,800
Lace Cloth	400
Government Bonds	7,000
Missouri-Pacific Stock	2,500
House Improvements	18,000

In addition to the above amounts, a total of approximately \$70,000 was loaned to E. Royce to be invested in Alder Gold-Copper Company, a company in which, in 1947 and years subsequent thereto, E. Royce was interested. Other amounts were given to E. Royce to reimburse him for payments he had made for Dora. (R. 275.)

After trial, the Tax Court held that Dora F. Royce was not a bona fide member of the Portland and Seattle partnerships during the taxable years for income tax purposes and that the Commissioner had properly included in the income of E. Royce the partnership profits reported by her. (R. 275.)

Seattle Partnership—Trust for Eunice Royce

On April 20, 1944, E. Royce executed a declaration of trust in favor of his daughter Eunice with respect

to 700 shares of common stock of the Yellow Cab Company of Seattle. (R. 278.)

The purpose, terms and conditions of the trust provided in part as follows (R. 278-282):

(1) To collect the net income therefrom and to pay the same over to my said daughter, or to accumulate the same for her use and benefit, and invest and reinvest the same as hereinafter provided for principal of the trust estate, and as her absolute and separate property for and during the term of her natural life, or until this trust is sooner terminated by my death or otherwise, as hereinafter provided for.

(2) I, as such trustee hereunder, am to have and there is hereby reserved to and vested in me full discretionary power and authority to sell or exchange from time to time, all of the aforesaid property or any part thereof, or any other property belonging to this trust, and to buy any other property upon such terms, for such price, or for such property as in my discretion I shall see fit; and the proceeds so received upon such sale or exchange shall be invested or reinvested in such securities or other properties as I may deem advisable, all of same to be held upon the same trusts as are hereinabove and hereinafter declared.

(3) In the event that it shall appear to me at any time or times that the personal or family necessities of my said daughter require a payment or payments of money to her, then in my sole discretion, I may pay over to her, and there is hereby reserved to me the power and authority to pay over to her, such portion of the corpus of the said trust estate as I may deem necessary or

proper; without first applying any net income or accumulated net income therefor, and in such event, any such payments may be treated by me, at my election, as trustee, as if an absolute gift had been made herein of such corpus or portions thereof to my said daughter, or as a loan to be repaid to the trust estate by her, either from future income or otherwise.

(4) This Trust shall be irrevocable, with no power reserved to alter, amend, cancel, revoke or terminate the same, except as may otherwise herein be provided.

* * * *

(6) I, alone, hereby reserve the right and power, during my lifetime to nominate and appoint a successor trustee, to carry out the provisions of this trust, in my place and stead, such appointment to take effect either during my lifetime or at my death, as I may direct, by the execution of a formal document designating such successor trustee, but the exercise of such power shall not exhaust the power or extend the term of the Trust. Any such appointment shall be completed upon the turning over and delivery to such successor trustee of the Trust property and estate.

(7) Should I at any time become incapacitated to administer this trust, or upon my death, in default of the appointment of another trustee by me, my wife, DORA F. ROYCE, my brother, B. ROYCE and A. L. SCHNEIDER shall act as co-trustees in my place and stead, each of said co-trustees to have an equal voice in the management of said estate, and such successor trustees are hereby directed to pay to my said daughter monthly or quarterly during her lifetime, begin-

ning with the date of my death, so much of the net income of the trust estate after paying costs and charges as may be necessary to meet the schooling, living and other needs and desires of my said daughter as she may direct.

In the event the annual income from the trust estate in any year, before or after my death, shall fall below \$2,000.00, and it shall appear to the trustee or trustees that the personal or family needs of my said daughter shall require a payment or payments or money in addition to the income from the trust property, the trustee or trustees in his or their discretion may pay over to my said daughter, and it is hereby reserved to such trustee or trustees the power and authority to pay over to her, such portion of the principal of the trust estate as may be necessary to pay to my said daughter sums which shall aggregate, at least, the sum of \$2,000.00. This provision is not intended to limit the payments to my said daughter, but to enlarge the powers otherwise granted in this instrument.

(8) Before making any investment, change of investment, or sale of any property or securities in the trust fund, the trustee or trustees who succeed me and their successors shall consult and advise with my said daughter, EUNICE M. ROYCE, and, if the said EUNICE M. ROYCE shall fail to indicate her disapproval of any proposed investment, change of investment, or sale, within fifteen (15) days after notice thereof, the trustees, if they deem the same advisable, may make such investment, change of investment or sale, without such approval.

(9) Upon my said daughter reaching the age of thirty-five (35) years, if, in the judgment of

the trustee or trustees then living, my said daughter desires to receive the corpus of the trust estate and she is considered by the said trustee or trustees to be capable of managing the trust estate wisely, then, and upon the concurrence of these two events, the trustee or trustees shall convey the corpus of this trust to my said daughter in her absolute right. If, in the judgment of the trustee or trustees my said daughter is not capable of managing the trust estate wisely when she reaches the age of thirty-five (35) years, then as soon thereafter as she convinces the trustee or trustees of her ability to manage said estate wisely, said trust property shall be conveyed to her absolutely.

* * * *

E. Royce never regarded the Declaration of Trust as a real trust, nor did he treat it as such during the ensuing years. He did not file fiduciary income tax returns for the trust. He made no accounting to Eunice, nor has he ever reported to her in respect to the status of the trust. He filed income tax returns in the name of Eunice M. Royce for the years 1944 and 1946 to 1949, inclusive. He signed her name "Eunice May Royce," or "E. M. Royce, by E. Royce, Trustee," on the returns. He so filed an unsigned Form 1040 for 1945. Eunice became eighteen years old in 1947. She lived at home until then. From 1947 to 1951 she went to the University of Oregon. From March, 1952, to March, 1954, Eunice worked for the Imperial Travel Bureau. She was married June 12, 1954. She is now Eunice Dodge and resides at Wenatchee, Washington. At the time of the hearing she was

twenty-six years of age. Eunice was first told about the trust in 1947 when she was eighteen years of age. (R. 282.)

During the years in question, substantially the only income reported on the returns filed in the name of Eunice Royce represented those earnings of the partnership distributable to "E. Royce, trustee for E. M. Royce," as follows (R. 283):

<u>Year</u>	<u>Amount</u>
1945	\$47,797.11
1946	54,826.23
1947	47,645.90
1948	20,863.27
1949	16,611.08

The drawing account of "E. Royce, trustee for E. M. Royce," on the books of the Seattle partnership disclosed withdrawals aggregating \$205,154.94 during the period from January 1, 1944, to December 31, 1949, as follows (R. 283):

<u>Year</u>	<u>Amount</u>
1944	\$ 16,422.49
1945	77,422.49
1946	46,922.49
1947	34,192.49
1948	21,462.49
1949	8,732.49
Total	<u>\$205,154.94</u>

On December 31, 1949, the earnings distributable to "E. Royce, trustee for E. M. Royce," exceeded the withdrawals by \$32,592.59. The excess amount had been retained in the business and not withdrawn. (R. 283.)

The foregoing withdrawals were deposited by E. Royce in a trust account at the United States National Bank. E. Royce, alone, was authorized to sign checks on this account. He has exercised absolute discretionary power and authority over the funds and, excepting for certain small amounts, Eunice has never received anything from the trust. The checks issued by E. Royce on the trust account during the period from January 1, 1944, to December 31, 1949, aggregated \$186,046.21, leaving a balance in the account of \$19,108.73. (R. 283-284.) These funds were directed to the following purposes (R. 284):

Payment of Federal and state taxes	\$89,464.96
Purchase of Government bonds	281.25
Payment of personal expenses of Eunice Royce	2,200.00
Loans to or for E. Royce	94,100.00
Balance left in account	19,108.73
<hr/>	
Total	\$205,154.94

During the years involved, Eunice had a personal checking account in The First National Bank, to which E. Royce sometimes deposited small amounts drawn from the trust account for certain personal expenses of Eunice while she attended college. Such deposits totaled \$2,200. (R. 284.)

The sole investment of trust funds in Governmental or other conventional securities amounted to \$281.25. This investment consisted of three checks drawn on the trust account in 1944 and 1945, made payable to "Yellow Cab Co." (R. 285.)

The "loans" to E. Royce from the trust account aggregated \$94,100 on December 31, 1949. Of this

amount, \$7,100 was loaned to Royce, Inc., and the balance of \$87,000 to E. Royce, personally. Royce, Inc., owned the Columbia Athletic Club building, and E. Royce was principal stockholder of the corporation. The loans to Royce, Inc., were made in 1948 and 1949, and were repaid in 1950. The loans to E. Royce consisted of three checks drawn on the trust account at the time and in the amounts indicated below (R. 285) :

<u>Check No.</u>	<u>Date of Check</u>	<u>Amount</u>
6	Between June 15 and July 10, 1945	\$60,000.00
10	December 29, 1945	25,000.00
15	July 10, 1946	2,000.00
Total		<hr/> \$87,000.00

These loans have not been repaid, and are now evidenced by three renewal notes bearing three per cent interest, the original notes having been canceled. (R. 285.)

These renewal notes are one-year notes made payable to Eunice Mae Royce. The dates of execution, face amounts and other data shown thereon are as follows (R. 486) :

<u>Date of Execution</u>	<u>Amount of Note</u>	<u>Repayment— Amount & Date</u>
July 10, 1951	\$2,000	\$ 200 (6-18-53) 500 (5- 5-53) 230 (5- 7-54) 85 (9-26-53)
July 7, 1952	60,000	3,500 (1-13-54) 1,000 (2-15-54)
December 26, 1953	25,000	None
	<hr/> \$87,000	<hr/> \$5,515

No interest has been paid and, aside from the above small payments, the loans to E. Royce from the trust account remain unpaid to date. (R. 286.)

The Commissioner determined that Eunice Royce was not a bona fide partner in the partnership and accordingly included in the income of E. Royce the partnership profits in the returns filed in her name. In affirming this determination the Tax Court held that E. Royce and the other parties involved did not in good faith and acting with a business purpose intend to join together with Eunice or with the trust of which she was beneficiary as partners in the conduct of the Seattle partnership. (R. 286.)

SUMMARY OF ARGUMENT

1. Section 115(a) of the Internal Revenue Code of 1939 sets forth the general rule that any distribution by a corporation to its stockholders constitutes a taxable dividend to the extent of its earnings. Section 115(c) provides an exception for distributions made in complete or partial liquidation of a corporation. This exception is then limited by Section 115(g) which provides that redemptions "essentially equivalent to the distribution of a taxable dividend" shall be treated as taxable dividends.

In the case at bar the taxpayers evolved a plan to acquire complete ownership of Oregon Motor Stages, whose stock was worth \$750,000, by using \$350,000 of Stages' surplus as part payment. This was accomplished by setting up one Bentson as a straw man, an ostensible borrower of \$350,000 from ABC and an ostensible stockholder in the corporation. The facts

show, however, and the Tax Court so held, that the loan by ABC to finance part of the purchase price of Stages' stock was in reality made to the taxpayers and not to Bentson. He did not take part in the negotiations leading up to the loan, the parent company of the loan company did not think it was lending the money to him, he did not have a net worth ample enough to undertake such a loan, and E. Royce signed the note with him as co-maker. When this situation is viewed in the light of the various criteria set forth by the courts to determine whether any given distribution is essentially equivalent to a dividend, it becomes apparent that the Tax Court correctly decided the case. There was no contraction of corporate business, and in fact a retention of earnings was required for the purchase of additional equipment after the war. The reason behind the corporate redemption was not a business consideration but rather was the personal desire of the stockholders from whom sprang the initiative for the distribution. Since the 350 shares ostensibly held by Bentson were actually held for the benefit of all the stockholders, the distribution did not serve to change the proportionate ownership of the stock. Also noteworthy is the fact that prior to 1945 substantial dividends were paid, and in contrast no formal dividends were declared once the corporation was under the control of the taxpayers. The most important criteria, the net effect of the action, shows that precisely the same result was accomplished by the distribution as it took place as would have been accomplished had a formal dividend been declared. The taxpayers were enabled to purchase one hundred

per cent control of a corporation which had a stock value of \$750,000 by the expenditure of \$400,000 of their own funds and the use of \$350,000 of the corporate earned surplus. Various incidental expenses incurred in connection with the loan which were paid by Stages were also dividends to taxpayers.

The Tax Court did not err in admitting the relevant minutes of ABC-Delaware (the loan company's parent) in connection with the loan application. This exhibit is admissible as a business entry. The taxpayers admitted its authenticity and identity. Taxpayers' main complaint appears to be that the Commissioner failed to lay a proper foundation for its reception. However, no contention whatsoever was made at the trial that the exhibit did not represent minutes made "in the regular course" of ABC-Delaware's business, and their trustworthiness is pointed up by the fact that they are routine business entries of a corporation in no way connected with the present litigation. In any event, assuming *arguendo* the correctness of taxpayers' contentions, the admission of the exhibit was not prejudicial. The Tax Court's decision rested upon much more than the exhibit.

2. A withdrawal of \$20,000 in 1945 by E. Royce from Hippodrome, a corporation of which he was the principal stockholder, was a dividend and not a loan. E. Royce executed no note, paid no interest, and the "loan" remains unpaid to date. The taxpayer in his petition to the Tax Court alleged that the funds had been accumulated by Hippodrome for the construction of a building for which there were plans in 1945, and that in anticipation of improved building conditions

the plans were held in abeyance and the corporation made the "temporary loan" until the funds were required. His proof, however, completely failed to support the allegations of the petition and it is apparent that at the time of the so-called loans the corporation had no such reason for accumulating the funds. The Tax Court was correct in subjecting this transaction between a corporation and its controlling stockholder to close scrutiny and properly found that the distribution was a dividend.

3. There are three family partnerships at controversy: The purported interest of Dora Royce in the Yellow Cab companies of Portland and Seattle, and that of Eunice Royce, minor daughter of E. Royce, in the Seattle company. The controlling consideration, as enunciated by the Supreme Court in the *Culbertson* case (p. 742) is—

whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."

In each of these three instances the purported capital contribution did not originate with the wife and daughter, but rather was a gift from E. Royce. A lack of original capital does not militate against the validity of a family partnership for tax purposes;

however, it is one of the circumstances to be considered in determining whether a bona fide partnership has been established. Where a purported partner has not contributed vital services, has not participated in the management and control of the business, and has not contributed "original capital," under the *Culbertson* case a heavy burden is placed on the taxpayer to show the bona fide intent of the parties to join as partners.

The Tax Court, in reaching its decisions favorable to the Commissioner, duly considered the legal principles set forth by *Culbertson*. As to Dora's purported interests, it is clear that her capital was in the form of a gift made to her contingently upon her joining the partnerships. There were no business reasons for taking her into the partnerships, and it is clear that keeping down family taxes is not of itself "business." Likewise, a so-called moral obligation to ^{give} gift a wife ^{str} because she had been of help to the husband does not constitute a business purpose for her entry into the partnership. As to Dora's services and management control, the Tax Court found that she only "performed certain relatively inconsequential services for the Portland firm," and it is clear that she did not exercise any real dominion or control over her "investments." Even more telling against the taxpayers' contentions is the fact that in reality it was E. Royce and not Dora who enjoyed the income distributed to Dora.

The trust for Eunice, minor daughter of E. Royce, is likewise not a bona fide member of the Seattle partnership. This purported interest, like those of the

wife, was set up with gift capital. There has not even been any attempt to ascribe a business reason for the trust joining the partnership. And the evidence makes it very clear that E. Royce did, in fact, treat the trust's so-called share of partnership income as if it were in reality his own. None of these partnerships are valid for tax purposes.

The decisions of the Tax Court are correct and should be affirmed.

ARGUMENT

I

The Disbursement Of Earnings By Oregon Motor Stages In Payment Of The ABC Note And The Simultaneous Redemption Of The 350 Shares Of Stock Purchased With The Proceeds Of Such Note, Together With The Disbursements For Incidental Expenses Charged By ABC For Making The Loan, Constituted Distributions Essentially Equivalent To Dividends

A. The statutory scheme

The general rule as set forth in Section 115(a) of the Internal Revenue Code of 1939 (Appendix, *infra*) is that any distribution either of money or property by a corporation to its stockholders constitutes a taxable dividend to the extent that the corporation has earnings. Out of this general rule an exception is carved by Section 115(c) (Appendix, *infra*) which provides that distributions made in complete or partial liquidation of a corporation will be treated as payments in exchange for the corporate stock even though the distribution may include earnings. The scope of the exception contained in Section 115(c) is,

however, definitely limited by Section 115(g) of the Code (Appendix, *infra*). That section provides that—

If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

Thus, the general rule as to corporate distributions is set forth in Section 115(a), an exception to this general rule in certain instances is set forth in Section 115(c), and this exception is then limited by Section 115(g).³

The purpose behind the enactment of Section 115(g) was to thwart various attempts to disguise ordinary dividends as liquidating distributions. This Court, in *Earle v. Woodlaw*, 245 F. 2d 119, 129, certiorari denied, 354 U.S. 942, quoted with approval the statement of the legislative history of the section as set down in *Hyman v. Helvering*, 71 F. 2d 342 (C.A. D.C.), certiorari denied, 293 U.S. 570:

This case describes the legislative history behind Sec. 115(g), 71 F.2d at page 344:

³ A reading of the Code provisions relative to corporate distributions, starting with Section 115(a), makes it clear that the taxpayers are in error when they state that the "general rule" is that the proceeds of a stock redemption are to be treated as the proceeds of a sale. (Br. 29.)

“Suppose * * * the case of two men holding practically the entire stock of a corporation for which each paid \$50,000. The corporation, having accumulated a surplus of \$50,000 above its cash capital, buys from the stockholders for cash one-half of the stock held by them and cancels it, and the payment is nontaxable because it is a partial redemption of stock. To change this result and make it taxable (g) was written and incorporated into the law.”

House, Senate and Conference Reports. H. Rep. No. 1, 69th Congress, first Session, p. 5; S. Rep. No. 52, 69th Congress, First Session, p. 15; H. Conf. Rep. No. 356, 69th Congress, First Session, p. 30.

It is with this legislative purpose in mind, then, that the distributions involved in the case at bar must be scrutinized.

B. The loan and purchase of 350 shares were for the benefit of taxpayers

1. The Tax Court's finding in this respect was not “clearly erroneous”

The factual situation which is before the Court presents a clear instance where the stock redemption should be treated as “essentially equivalent to the distribution of a taxable dividend.” The apparent plan which the taxpayers evolved to acquire complete ownership of Stages, whose stock was worth \$750,000, by using \$350,000 of Stage's funds for payment without incurring the normal tax liability for a dividend distribution, is the type of situation where dividend treatment is required by Section 115(g).

The taxpayers would have this Court view the stock redemption in a vacuum, without any consideration whatsoever of the long series of interrelated transactions which led to the so-called purchase by Bentson of 350 shares. The Tax Court, however, refused to adopt the narrow attitude espoused by taxpayers and found it necessary to consider all of the facts involved in the relatively short time period between the negotiations for the loan to purchase the stock and the redemption of the 350 shares. These events are in three general phases, namely, the purchase on July 2, 1945, of the entire capital stock of Stages consisting of 750 shares for \$750,000, 400 shares with funds provided by the taxpayers and 350 shares, with funds borrowed from ABC; the simultaneous transfer of the entire capital stock on July 2, 1945, to ABC as security for the note to ABC in the amount of \$350,000; and the disbursement of corporate earnings on September 6, 1945, in the amount of \$350,000 in payment of the ABC note and the simultaneous redemption of 350 shares of stock. Whether or not this redemption constitutes a dividend depends to a large extent upon the question of whether the indebtedness to ABC was incurred on behalf of the taxpayers. Thus, the bona fides of Bentson's participation in the purchase of the corporation is of primary concern. It is the position of the Commissioner that Bentson was no more than a straw-man on behalf of the taxpayers in the purchase of the 350 shares and that in reality the taxpayers purchased the entire capital stock of Stages with funds which consisted of \$400,000 of their own funds and \$350,000 borrowed

from ABC; they then repaid the \$350,000 with funds obtained from the corporation.

L. R. Bentson, at the time in question, was an elderly man who occasionally left his home in Canada to visit a niece and two nephews in Portland. He was in Portland sometime around the date of the purchase of the stock, and the taxpayers have attempted to show, although only by the testimony of interested witnesses whose credibility obviously did not impress the Tax Court, that Bentson took an active part in the purchase of the stock and the negotiations for the loan from ABC. The evidence, however, is to the contrary and the Tax Court rightly so held. In fact, E. Royce informed the revenue agents that the financial arrangements with respect to the ABC loan were handled by Jacob and McCulloch, the attorneys for the former stockholders.⁴ (R. 583.) Jacob, on the other hand, told the agents that his part in the loan negotiations was limited to introducing E. Royce and Bentson to George Davidson, manager of ABC-Portland, and that the loan negotiations were carried on by them, the same story he told at the hearing. (R. 585.) That Mr. Bentson did not participate in the events leading up to the negotiation of the loan is apparent from the statements of the taxpayers to the revenue agents prior to the trial herein, from the records of ABC and from the fact that negotiations for the loan were made prior to the time Bentson even arrived in Portland, thus making it physically impossible for him to have submitted the application

⁴ This statement is, of course, in marked variance with the testimony given by E. Royce during the trial herein.

for the loan, and/or to have participated in the negotiations.

The minutes of ABC-Delaware, the parent company of ABC-Portland through which the loan was obtained, read as follows (R. 223-224) :

A group of outstanding individuals in Portland, headed by Messrs. Barney and Roy Royce and Robert Jacob, desire to purchase the entire capital stock of Oregon Motor Stages * * *. The stock is to be acquired for a price of \$750,000. The purchasers intend to buy 400 shares for \$400,000, with their own funds. They ask that we extend a line of credit for \$350,000, the balance of the purchase price of Oregon Motor Stages stock. We are asked to lend Mr. Roy Royce, personally, the sum of \$350,000, on his note, to be secured by all of the capital stock of Oregon Motor Stages.

It is noteworthy that Mr. Bentson, who the taxpayers contend to be the real debtor to ABC, is nowhere mentioned in these minutes. Lending credence to the ABC record is the admission of Niederkrome, made during his interview with the revenue agents, that the taxpayers borrowed the \$350,000 from ABC. (R. 594-595, 606-607.) As the agent testified during the hearing (R. 594-595) :

He [Niederkrome] said he did not know whether stock was put up as collateral for the loan by American Business Credit Corporation, but he did know that a loan was obtained and he explained the general financing of the transaction. He said that the new group of stockholders put up four hundred thousand dollars,

and they borrowed three hundred fifty thousand dollars.

The Tax Court found that there was no proof that in July, 1945, Bentson had a net worth ample to undertake the purchase of \$350,000 worth of stock. (R. 239.) He lived modestly and left a small estate of approximately \$34,000 at the time of his death in 1950, which was only five years after the time of his so-called purchase. While his day-books indicated that he was careful to record his small transactions, there were no entries therein pertaining to the purchase and sale of the Stages stock. (R. 222, 231, 240.)

Additionally, the Tax Court found as a matter of fact that Bentson did not become involved in the transaction until after application for the loan was made by Ezra Royce because he did not arrive in Portland until after that time. (R. 241-242.)

Likewise compelling in support of the Tax Court's determination that the loan was obtained by Ezra Royce on behalf of the taxpayers were the facts that Ezra Royce signed the ABC note as co-maker (R. 225-227); that all of the stockholders put up their stock as collateral for the ABC loan (R. 225); that Stages paid the ABC service charge and interest on the loan (R. 227, 231); that the redemption of the stock was for the same price per share at which it was purchased and that the ABC note was immediately paid. (R. 231). The holding by the Tax Court that Bentson was only a straw-man in this transaction is well supported by the evidence.

This is no more than a run-of-the-mill question of

fact and the finding of the Tax Court must be upheld unless it can be said to be clearly erroneous. *Helvering v. Nat. Grocery Co.*, 304 U.S. 282; *Commissioner v. Scottish American Co.*, 323 U.S. 119. While the ultimate question of whether the distribution was essentially equivalent to a dividend has been held by this Court to be a mixed question of law and fact (*Earle v. Woodlaw*, *supra*; *Pacific Vegetable Oil Corp. v. Commissioner*, 251 F. 2d 682), the determination that the taxpayers herein and not Bentson incurred this indebtedness is a simple question of fact and the record is replete with evidence in support of it. Bentson was merely allowing his name to be used in an attempt to purchase the 350 shares of stock with accumulated earnings of Stages without the tax liability of a dividend distribution. He held the stock in behalf of the other stockholders, the taxpayers herein.

2. The Tax Court did not err in admitting the minutes of ABC-Delaware in connection with the loan application

The taxpayers contend that Exhibit A was improperly admitted. This exhibit consists of a certification by the treasurer and assistant secretary of Crown Finance Company, Inc., a Delaware corporation which was formerly named the American Business Credit Corporation, attaching a copy of the minutes of a meeting of the executive committee of ABC-Delaware held on June 20, 1945. (Br. 5a-11a.)

The parties stipulated that Exhibit A "may be offered in evidence at the trial of the above-entitled cases without further identification or authentica-

tion, subject, however, to any and all other objections as counsel may make thereto at the trial of said cases." (R. 213-214.)

During the course of the trial, taxpayers objected to the exhibit's admission as follows (R. 613-614):

* * * we strenuously object to its admission in evidence on the ground that it is incompetent, irrelevant, immaterial, and purely hearsay. * * * Here, there is an affidavit by a person who was not an officer of the corporation at the time the affidavit—at the time the transaction took place, he was the Secretary at the time the affidavit was made—he—certifies to that affidavit—through that affidavit that the photostat there is a true copy of minutes of a certain meeting. Those minutes, however, report a report of Mr. Davidson who is dead. There is no showing that Mr. Royce or Mr. Jacob or Mr. Bentson or anybody else was back east. There is no evidence that they were there; that they knew what Mr. Davidson was saying. The affidavit, the report of Mr. Davidson, at that Executive Committee in the east was the purest kind of hearsay. He was the Manager out here trying to get a loan through. And we weren't—no party—no purchaser was there being represented. I want it clearly understood that I have stipulated that I have no objection to the authenticity or to the identity of this thing, but I have strenuous objections on the grounds of materiality and hearsay. * * * And here, it is the purest kind of hearsay, with none of these people there whom he seeks to bind or to charge with whatever is in those minutes. Furthermore, I point out in the affidavit, that in paragraph six of the affidavit,

the gentleman who made it, attempts to state something about a loan when the affidavit bears the date of 1955, the 21st day of April, about something that happened ten years before, when he wasn't present or knew anything about it. And for that reason, I think it is the purest hearsay. We object to the photostat and to all parts of the affidavit, insofar as they state facts.

This exhibit is admissible as a business entry. As the taxpayers correctly state, 28 U.S.C., Section 1732 (Appendix, *infra*), is applicable to proceedings in the Tax Court. This statute provides:

§ 1732. *Record made in regular course of business; photographic copies.*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

* * * *

The statute was enacted to do away with the common-law requirement that business records must be

identified by the persons who made them. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109. In that case the court stated (p. 115):

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed.

If the exhibit fits within the purview of the Business Records Act, as the Commissioner contends, it is admissible despite the common law rule of hearsay. The main complaint about the exhibit appears to be that the Commissioner failed to lay a proper foundation for its reception. In this respect the above set out objections of taxpayers' counsel during the course of the trial should be noted. No contention whatsoever was made that the exhibit did not represent minutes made "in regular course" of ABC-Delaware's business.⁵ There is no question at all that Exhibit A

⁵ Compare *United States v. Feinberg*, 140 F. 2d 592 (C.A. 2d), cited by taxpayers, where the specific objection was made that there had been no testimony that certain corporate books (not minutes) had been kept in the regular course of business. Also see *Clainos v. United States*, 163 F. 2d 593 (C.A. D.C.), where the court held that a photograph of the accused which had on its back a series of notations as to convictions of various crimes was not admissible over objection; the court held that these were not the type of records encompassed by the business record statute, particularly where Congress specifically provided in the District Code for a different method of proving convictions. Likewise in *Schering Corp. v. Marzall*, 101 F. Supp. 571 (D.C. D.C.),

is a correct copy of the minutes of the meeting in question.⁶ And the fact that corporations keep minutes would appear to be subject to judicial notice. Indeed, under the laws of Delaware, the state of incorporation of ABC-Delaware, there is a mandatory requirement that such minutes be kept. 8 Delaware Corporation Code, Section 142.

Once again, it must be repeated that taxpayers have admitted the authenticity and identity of this document. (R. 213-214, 613-614.) Thus, the argument devoted to lack of authenticity (Br. 49) is aimed at a point which has been already conceded by taxpayers.

The next point made is that the exhibit is not trustworthy, and that the crux of trustworthiness is that the records are routine or automatic reflections of business transactions. Taxpayers again ignore the point that corporate minutes are entries made in the routine course of business. The trustworthiness of the minutes here under consideration is apparent when the circumstances are examined. They are admittedly a summarized version of the meeting of ABC-Delaware's executive committee. But we do not

the papers excluded in a patent action were not corporate minutes, but rather were laboratory notebooks which were not identified by the person who made the entries or by any person who saw them contemporaneously with the events they purported to record.

⁶ "I want it clearly understood that I have stipulated that I have no objection to the authenticity or to the identity of this thing, but I have strenuous objections on the grounds of materiality and hearsay." (R. 613-614.)

understand that condensation renders such records inadmissible. They are the minutes of a corporation which is in no way connected with the present litigation, which has and had at the time of the meeting "no ax to grind" in relation to these cases. They merely considered whether or not a certain loan should be granted by their subsidiary and made a decision thereon.

As to the contention that Davidson might have been prone to exaggeration in his eagerness to have the loan granted (which is, of course, pure conjecture at the most), we can only refer to the statute which provides that "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

In any event, assuming *arguendo* the correctness of all of the taxpayers' contentions in this respect, the admission of the exhibit was not prejudicial. As noted in point B(1) of this section, the Tax Court rested its decision upon much more than Exhibit A. The vagueness of interested witnesses at the time of the revenue agents' investigation vis-a-vis their specific and detailed tales many years later at the trial, the net worth of Bentson which was insufficient to obtain a loan of such magnitude, the securing of all the capital stock of Stages for the loan, the signing of the note by E. Royce, etc., all went to prove the Commissioner's case. The argument that this whole case rested on Exhibit A is patently untenable.

C. *The distribution of \$350,000 was essentially equivalent to a dividend*

The situation, stripped of all the paper machinations that went on, was as follows. The taxpayers purchased Stages for \$750,000. They put up \$400,000 of their own funds and borrowed the remaining \$350,000 from ABC, putting up all of the capital stock as collateral. Then, in order to pay off the note, they had Stages redeem 350 shares of stock, financing the purchase from accumulated earnings, and using the money so obtained, paid the ABC note. Viewed thusly, there is no question that the redemption was essentially equivalent to a dividend. The various criteria used to determine whether or not a distribution is to be treated as a dividend were set forth and discussed by this Court in its recent decision of *Earle v. Woodlaw*, *supra*. See also *Pacific Vegetable Oil Corp. v. Commissioner*, *supra*; *Phelps v. Commissioner*, 247 F. 2d 156 (C.A. 9th); *Flanagan v. Helvering*, 116 F. 2d 937 (C.A. D.C.). Those criteria, as applied to this case, are discussed below.

First, however, an aspect not present in *Earle v. Woodlaw*, *supra*, should be noted. Here the stockholders had not paid for the redeemed 350 shares of stock with their own funds and accordingly they did not receive cash in hand on the redemption of the stock. This is a case where the redemption of stock was accompanied by use of corporate earnings for payment of the purchase price of the redeemed stock for the benefit of the stockholders. But it is well settled that the use of corporate earnings for the purchase and redemption of stock for the benefit of

the stockholders, as distinguished from benefit to the corporate enterprise, constitutes a taxable dividend to the stockholders so benefitted. See *Wall v. United States*, 164 F. 2d 462 (C.A. 4th); *Holloway v. Commissioner*, decided December 12, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,359), affirmed *per curiam*, 203 F. 2d 566 (C.A. 6th); *Woodworth v. Commissioner*, 218 F. 2d 719 (C.A. 6th).

I and II. *Did the corporation adopt any plan or policy of contraction of its business activities? Did it follow an orderly procedure looking toward its ultimate dissolution, or its ultimate contracted operations?*

There is no evidence at all that Stages had a plan or policy of contraction of its corporate business. The record shows, in fact, that just the opposite was the case. A large surplus had been built up as a reserve for the purchase of additional equipment, and in the tax return of Stages for 1946 a statement appears that retention of earnings was required for replacement of worn equipment and further expansion. Long-term obligations were incurred in 1945, 1946 and 1947 to provide funds for new equipment. The need for money for this purpose was known when the stock was redeemed, and without the redemption these purchases could have been made out of Stages' reserve.⁷ (R. 234-235, 243.) There was no intent to contract corporate activities, and in fact the corporation continued to operate, and at a profit. (R. 235.)

⁷ At the end of 1944 Stages had among its assets governmental securities aggregating \$546,172.58. At the end of 1945, after the redemption it retained only \$755.61 of such securities. (Balance Sheet Schedule attached to Exhibit 4; R. 233.)

III. *Did the initiative for the corporate distribution come from the corporation, based on usual business considerations, or did it come from the stockholders for their own purpose?*

As discussed above, it is clear that there was no plan of contraction of corporate activity whatsoever. Likewise there was no indication of overcapitalization of Stages. The reason behind the corporate redemption was not a business consideration of the corporation but rather was the personal desire of the stockholders. The corporate activities of Stages were hampered by the redemption, rather than enhanced. All of the initiative for the distribution sprang from the personal considerations of the stockholders.

IV. *Is proportionate ownership of stock changed?*

The 350 shares ostensibly held by Bentson were actually held for the benefit of all the stockholders. Their stock secured the loan from ABC which enabled the purchase of the 350 shares and the indebtedness was incurred in their behalf. Thus, after the redemption each of the taxpayers herein held precisely the same proportional interest in the corporation which they had held prior to the redemption. The argument that Treasury Regulations 111, Section 29.115-9, Appendix, *infra*, which provides that the redemption of all of the stock of one stockholder will not be treated as a dividend is applicable in this case and is being ignored by the Commissioner is not correct. The regulation is intended to cover only those situations involving bona fide stockholders and it is patently not applicable to persons holding stock in

form only. Here the redemption in substance was pro rata.

V. *What were the amounts, the frequency, and the significance of dividends paid in the past?*

Stages had paid substantial dividends in the years prior to taxpayers' acquisition of the stock. (R. 233.) The amount of these dividends are not of record. In contrast, no formal dividends were declared in 1945 and 1946, nor in any other year under the operation of the taxpayers. (R. 235.)

VI, VII and VIII. *Does the capitalization, at the time of cancellation of the stock, represent capital paid in, or earnings from the business? Was there a sufficient accumulation of earned surplus to cover the distribution, or was it partly from capital? Was there a maintenance of a relatively similar amount of capital liability, or did that figure decrease to a degree somewhat comparable to the purported distribution of capital?*

There is nothing of record to indicate the original source of the capital. There can be no dispute, however, of the fact that at the time of the distributions Stages had undivided profits in the amount of \$446,552.78 (R. 233-234), an amount well in excess of the distributions of \$350,000, \$4,315.07, and \$3,739.73. (R. 227, 231.) The amounts distributed would clearly have been available for purposes of the declaration of a formal dividend. See *Goldstein v. Commissioner*, 113 F. 2d 363 (C.A. 7th). The capital stock shown on the books of Stages decreased from \$100,000 to \$40,000. (R. 233-234.) This, however, does not tend to show any contraction in the activity of Stages.

IX. *Was there good faith, or bad, in the action of the Board of Directors?*

This element has been held to be of no real importance. *Hirsch v. Commissioner*, 124 F. 2d 24 (C.A. 9th); *Earle v. Woodlaw*, *supra*; *Pacific Vegetable Oil Corp. v. Commissioner*, *supra*; *Patty v. Helvering*, 98 F. 2d 717; *Commissioner v. Quackenbos*, 78 F. 2d 156 (C.A. 2d); *Flanagan v. Helvering*, *supra*.

X. *What was the net effect of the actions taken?*

This is the most important of the many criteria considered in such cases. *Earle v. Woodlaw*, *supra*; *Pacific Vegetable Oil Corp. v. Commissioner*, *supra*; *Hirsch v. Commissioner*, *supra*; *Flanagan v. Helvering*, *supra*; *Hyman v. Helvering*, *supra*; *Kirschenbaum v. Commissioner*, 155 F. 2d 23 (C.A. 2d), certiorari denied, 329 U.S. 726; *Boyle v. Commissioner*, 187 F. 2d 557 (C.A. 3d), certiorari denied, 342 U.S. 817; *Commissioner v. Roberts*, 203 F. 2d 304 (C.A. 4th); *McGuire v. Commissioner*, 84 F. 2d 431 (C.A. 7th), certiorari denied, 299 U.S. 591; *Commissioner v. Snite*, 177 F. 2d 819 (C.A. 7th); *Vesper Co. v. Commissioner*, 131 F. 2d 200 (C.A. 8th). In this case, as in *Pacific Vegetables Oil Corp.*, *supra*, the corporation was in substantially the same position before the redemption as after it. Business was carried on in the same manner. Stages continued to operate under its permanent franchise with the Interstate Commerce Commission, and it continued to serve the people who desired to use its facilities. (R. 234.) Precisely the same result was accomplished by the actions taken as would have been accomplished

by the distribution of a dividend. Both the earned surplus and Government bonds were reduced in the same manner as probably would have occurred had a formal dividend been declared. The taxpayers were enabled to purchase one hundred per cent control of a corporation which had stock of a value of \$750,000 outstanding by the expenditure of \$400,000 of their own funds and the use of the corporate earned surplus of \$350,000. There is no difference at all in the net effect of the actions taken in this case and those that would have occurred had a dividend been declared.

D. The incidental expenses paid by Stages were dividends to the taxpayers

The small point remaining concerns the incidental expenses paid by Stages to ABC in connection with the loan. From the facts and arguments set forth above, it is apparent that Stages was paying obligations of the taxpayers. These obligations covered not only the \$350,000 purchase price of the redeemed stock but, ^{also} \$4,315.07 for servicing fees and \$3,739.73 for interest. Section 115(a) of the Code, *supra*, defines "dividend" as "any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913." Thus, just as the purchase price of the stock is a dividend as having been paid for the benefit of the stockholders, a payment by the corporation of personal obligations of its stockholders falls within the Section 115(a) definition of a dividend. See *Ferro v. Commissioner*, 242 F. 2d 838 (C.A. 3d); *Wall v. United States*, *supra*; *Greens-*

pon v. Commissioner, 229 F. 2d 947 (C.A. 8th). As the Fourth Circuit stated in *Wall v. United States*, *supra*, p. 464:

It cannot be questioned that the payment of a taxpayer's indebtedness by a third party pursuant to an agreement between them is income to the taxpayer. *Douglas v. Willcuts*, 296 U.S. 1, 9, 56 S. Ct. 59, 80 L. Ed. 3, 101 A.L.R. 391; *United States v. Boston & Maine R. Co.*, 279 U.S. 732, 49 S.Ct. 505, 73 L. Ed. 929; *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 918. The transaction is regarded as the same as if the money had been paid to the taxpayer and transmitted by him to the creditor; and so if a corporation, instead of paying a dividend to a stockholder, pays a debt for him out of its surplus, it is the same for tax purposes as if the corporation pays a dividend to a stockholder, and the stockholder then utilizes it to pay his debt.

E. *The Tax Court's decision was correct*

The Tax Court was clearly correct in terming all of the distributions in question to be essentially equivalent to dividends.

The argument that the Tax Court in making this decision regarded the Commissioner's deficiency determination as affirmative evidence (Br. 56-64) is clutching at straws. To attempt to argue that the Tax Court did not consider the Commissioner's evidence but rather relied upon the presumption is to ignore the extensive findings of fact made by the Tax Court, in great part from the positive evidence introduced during the course of the trial by the Commis-

sioner. The Tax Court was saying that the evidence preponderated in favor of the deficiency as determined by the Commissioner and it was clearly correct in so holding.

II

The \$20,000 Disbursement By Hippodrome To E. Royce Was Not A Loan And Was Taxable To Him As A Dividend

It is the position of the Commissioner that a withdrawal of \$20,000 by the taxpayer E. Royce in 1945 from Hippodrome Amusement Company was a dividend and is taxable as such. E. Royce, on the other hand, contends that this withdrawal constitutes no more than a loan to him from the corporation.

The facts are simple. E. Royce was the principal stockholder, officer and director of the corporation. The other stockholders were his brother, B. Royce, who was inactive and away most of the time; Niederkrome, his brother-in-law, who worked under E. Royce and followed his instructions and orders; and one Bartle, concerning whom there is no evidence. (R. 258, 518-519). The amount of \$20,000 was withdrawn in 1945 by E. Royce with the consent and agreement of his brother and brother-in-law. He simply requested the money and it was given to him, admittedly a normal procedure in the conduct of the affairs of the corporation. There were no corporate minutes authorizing the payment, and the amount was recorded on the books as an account receivable. E. Royce executed no note or other evidence of indebtedness, he paid no interest at any time, and the alleged loan remains unpaid although he was at all times

financially able to repay the amount withdrawn. (R. 258-259, 521.) As far as appears from the record, no dividends were ever formally declared or paid by Hippodrome in the years before or after 1945, although its financial and operating condition would have warranted the distribution of dividends. (R. 260.) E. Royce testified that this distribution was a corporate loan to him (R. 412, 419), that the funds had been accumulated by Hippodrome for the purpose of constructing a building on its unimproved property in Seaside, and that it was his intention to repay the amount as soon as the funds were required for construction (R. 413-414, 419).

The Tax Court petition filed on behalf of E. Royce alleged *inter alia* that Hippodrome had a plan certain in 1945 to build a downtown ticket office and terminal building for Oregon Motor Stages; that it had "been accumulating its funds for that purpose, but the construction of a building in accordance with the plan of the company was being held in abeyance" in anticipation of improved building conditions; and that the company therefore advanced "\$20,000.00 from its said building funds as a temporary loan and/or until such time as the said company's building program could be put into effect." (R. 59, 70-71, par. V(t) and (u).)

The Tax Court held that the distribution was a dividend within the meaning of Section 115(a) of the Code.⁸ (R. 262.) The various principles of law

⁸ Section 115(a) defines "dividend" thusly:

The term "dividend" when used in this chapter (except in section 201(c)(5), section 204(c)(11) and sec-

involved herein are well-settled. As the Court of Appeals for the Eighth Circuit stated in *Wiese v. Commissioner*, 93 F. 2d 921, 922, certiorari denied, 304 U.S. 562:

The principles of law invoked by each party are relatively simple. When the principal shareholder of a corporation makes a permanent withdrawal of funds from the company, he is deemed to have received income at the time of withdrawal, although the formalities of a dividend distribution have not been observed and the payment is recorded on the books of the company as a loan. *Chattanooga Savings Bank v. Brewer*, 6 Cir., 17 F. 2d 79; cf. *Christopher v. Burnet*, 60 App. D.C. 365, 55 F. 2d 527; *Anketell Lumbar & Coal Co. v. United States*, 1 F. Supp. 724, Ct. Cl.

But if the stockholder borrows money from the company, and subsequently the company cancels the debt, income accrues to the stockholder at the time when the character of the withdrawal changes from a loan to a distribution of profits. *Cohen v. Commissioner*, 6 Cir., 77 F. 2d 184; cf. *Fitch v. Helvering*, 8 Cir., 70 F. 2d 583.

The Court in *Wiese* makes it clear that such a determination is a question of fact, and upon review said (p. 923)—

“Such a determination of fact is not to be set

tion 207(a)(2) and (b)(3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913 * * *

aside by a court even if upon examination of the evidence it might draw a different inference." *Palmer v. Helvering, Commissioner*, 58 S. Ct. 67, 70, 82 L. Ed. —, decided November 8, 1937; *Elmhurst Cemetery Company v. Commissioner*, 300 U.S. 37, 40, 57 S. Ct. 324, 325, 81 L. Ed. 491; *Helvering v. Rankin*, 295 U.S. 123, 131, 132, 55 S. Ct. 732, 736, 79 L. Ed. 1343.

See also *Allen v. Commissioner*, 117 F. 2d 364 (C.A. 1st); *Regensburg v. Commissioner*, 144 F. 2d 41 (C.A. 2d), certiorari denied, 323 U.S. 783; *Lengsfeld v. Commissioner*, 241 F. 2d 508 (C.A. 5th).

The facts that the withdrawal was recorded on the corporate books as a debt against E. Royce, that it was not proportionate to holdings of stock nor participated in by all the shareholders and that the formalities of a dividend declaration were lacking are not conclusive against a finding that the withdrawal was a dividend. Such was the precise holding of the Second Circuit in *Regensburg v. Commissioner, supra*, where the court also cited for this well-settled point (p. 44) the following cases: *Chattanooga Sav. Bank v. Brewer*, 17 F. 2d 79 (C.A. 6th), certiorari denied, 274 U.S. 751; *Hadley v. Commissioner*, 36 F. 2d 543 (C.A. D.C.); *Christopher v. Burnet*, 55 F. 2d 527 (C.A. D.C.); *Anketell Lumber & Coal Co. v. United States*, 1 F. Supp. 724 (C. Cls.). See also *Paramount Richards Th. v. Commissioner*, 153 F. 2d 602 (C.A. 5th); *58th St. Plaza Theatre v. Commissioner*, 195 F. 2d 724 (C.A. 2d); *Cleveland Shopping News Co. v. Routzahn*, 89 F. 2d 902 (C.A. 6th).

The taxpayer, in his petition to the Tax Court,

stated that the funds had been accumulated for the construction of a building for which there were plans in 1945, and that in anticipation of improved building conditions the plans were held in abeyance and the corporation therefore made the "temporary loan." His proof, however, did not support the allegations of the petition. It was testified by both E. Royce and Niederkrome that there were no such plans for building in 1945. (R. 420-421, 519-520.) Thus such a factor was of no relevance whatsoever in determining whether or not a loan was made in 1945. Had the evidence supported the petition the Tax Court might possibly have inferred that there was present an intent to repay the corporation as soon as building started. However, from the evidence put forward by taxpayer, there is no indication at all that Hippodrome, at the time of the distribution, had any plans for construction which would tend to prove that the \$20,000 was to be returned to it. The evidence of taxpayer as to *subsequent* building plans is of course of absolutely no relevance as to the 1945 transaction.

It has frequently been held that transactions between a corporation and its controlling stockholders are subject to special scrutiny. See, e.g., *Higgins v. Smith*, 308 U.S. 473; *Ingle Coal Corp. v. Commissioner*, 174 F. 2d 569 (C.A. 7th). And the Tax Court here was well-warranted in applying such special scrutiny to a situation where a so-called loan has been outstanding since 1945 to a controlling stockholder, where there is only the testimony of interested witnesses that the distribution was a loan and not

a dividend, where the corporation paid no other dividends, and where the stockholder who received the "loan" had a large net worth at the time of the distribution. The Tax Court, which had an opportunity to observe the witnesses, inferred from all these facts that the distribution was a dividend. This holding is patently not erroneous and should be affirmed.

III

The Tax Court Did Not Err In Finding, Upon The Record As A Whole, That The Parties Did Not Intend Dora To Be A Bona Fide Partner In Either The Portland Or Seattle Partnerships Or Eunice (Or The So-Called "Trust") To Be A Bona Fide Partner In The Seattle Partnership

A. Introduction

There are three family partnerships at controversy in this case. The first involves the validity of a so-called partnership between E. Royce and Dora Royce, husband and wife, in the Yellow Cab Company of Portland, the second involves the same parties in the Yellow Cab Company of Seattle, and the third involves E. Royce and the Eunice Royce Trust in the Yellow Cab Company of Seattle. Eunice Royce is the daughter of Dora and E. Royce. In each instance the Commissioner determined that all of such income was taxable to the husband and father, E. Royce. After trial, the Tax Court, upon the record as a whole, affirmed such determinations. Since the same general legal principles control the disposition of each of these three issues, we will first discuss the applicable case law and then refer specifically to each of the purported partnerships.

B. *General principles*

The rules of taxation involved in family partnership cases are well known to this Court. See, e.g., *Parker v. Westover*, 186 F. 2d 49, 221 F. 2d 603, 248 F. 2d 490; *Smith v. Westover*, 237 F. 2d 201; *Pike v. United States*, 231 F. 2d 688; *Sellers v. Commissioner*, 218 F. 2d 380; *Snyder v. Westover*, 217 F. 2d 928; *Toor v. Westover*, 200 F. 2d 713.

The controlling principles were enunciated in *Commissioner v. Tower*, 327 U.S. 280, and *Lusthaus v. Commissioner*, 327 U.S. 293, and were reaffirmed and clarified in *Commissioner v. Culbertson*, 337 U.S. 733. "The issue is who earned the money and that issue depends on whether this husband and wife really intended to carry on business as a partnership." *Commissioner v. Tower*, *supra*, p. 289. As reiterated in the *Culbertson* case, *supra*, p. 742, the test is—

whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

Thus, while the ultimate question of fact is whether the parties intended in good faith to join in partnership, their understanding of what a partnership is must conform to the legal standards of what consti-

tutes a partnership for tax purposes. The Supreme Court has defined a partnership for tax purposes as "an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services." *Commissioner v. Culbertson*, *supra*, p. 740. That each partner must contribute either capital or services was repeatedly emphasized in the *Culbertson* case. For example (pp. 744-745)—

If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient.

And the capital contributed must be capital of which the partner was the true owner. In remanding the *Culbertson* case to the Tax Court for the purpose of ascertaining which if any of the taxpayer's sons were partners with him, the Court said (p. 748):

As to which of them, in other words, was there a bona fide intent that they be partners in the conduct of the cattle business, either because of services to be performed during those years, or because of contributions of capital *of which they were the true owners*, * * * [Italics supplied.]

There is no dispute that in each of these three issues the purported capital contribution did not originate with the wife and daughter. Thus, as part and parcel of the planned formation of the partnerships,

E. Royce gave to his wife and the trust set up for his daughter shares of stock in the predecessor corporations. The capital so obtained must be classified as gift capital. *Smith v. Henslee*, 173 F. 2d 284 (C.A. 6th).

We wish to make it clear at the outset, however, that the Commissioner has not based his case in these three situations solely on the fact that the wife and daughter did not contribute original capital. The *Culbertson* case does not allow for such a position as a matter of law. See *Culbertson*, *supra*, pp. 745-747. As this Court stated in *Sellers v. Commissioner*, 218 F. 2d 380, 383:

While the absence of a contribution of original capital is not conclusive, it is a circumstance to be considered when determining whether a bona fide partnership has been established. *Commissioner of Internal Revenue v. Culbertson*, *supra*; *Harkness v. Commissioner of Internal Revenue*, 9 Cir., 193 F. 2d 655.

On the other hand, a situation where a purported partner has not contributed vital services, has not participated in the management and control of the business, and has not contributed "original capital," while not conclusive as a matter of law, "has the effect of placing a heavy burden on the taxpayer to show the bona fide intent of the parties to join together as partners." *Commissioner v. Culbertson*, *supra*, p. 744; *Wisdom v. United States*, 205 F. 2d 30 (C.A. 9th); *Feldman v. Commissioner*, 186 F. 2d 87, 90-91 (C.A. 4th).

In this as in many other fields of taxation it is

the substance of the matter which is controlling.⁹ The fact that the form of each of these transactions indicates that the wife and Eunice's trust owned the applicable interests in the profits is not the end of the inquiry, for it must be determined whether they were, in substance, the "true" owners of the capital. *Commissioner v. Culbertson*, *supra*, p. 748. This in turn depends in part upon whether the purported partner exercised an owner's right of control over the interest. The answer to this question in the case at bar is resolved by inspecting the dominion retained by E. Royce over the partnership interests and the proceeds therefrom. The Court in *Culbertson* (p. 747) indicated that where the alleged partnership rests upon a contribution of gift capital and no services are thereafter performed, a valid partnership for tax purposes exists only if the donee "exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income * * *." See also *Helvering v. Clifford*, 309 U.S. 331; *Helvering v. Horst*, 311 U.S. 112; *Commissioner v. Sunnen*, 333 U.S. 591; *Corliss v. Bowers*, 381 U.S. 376. The quantum of enjoyment by Dora and Eunice (through

⁹ It is fundamental that, inasmuch as taxation is concerned with economic realities rather than legal technicalities, the substance rather than the form of a transaction governs its federal income tax effect, and literal compliance with the words of a section of the Code does not suffice *per se* to bring the transaction within it. *Commissioner v. Court Holding Co.*, 324 U.S. 331; *Higgins v. Smith*, 308 U.S. 473; *Burnet v. Wells*, 289 U.S. 670; *Gregory v. Helvering*, 293 U.S. 465; *Commissioner v. Culbertson*, *supra*.

the trust) of the fruits of the partnership is therefore a major factor. *Commissioner v. Culbertson*, p. 747.

The purpose of the formation of the partnership is also important. The *Culbertson* test specifically requires that the parties act with a "business purpose" (p. 742) and this Court has considered that factor in determining the effect of family partnerships for tax purposes (*Parker v. Westover*, 248 F. 2d 490; *Pike v. United States*, *supra*).

The Tax Court, quoting the guideposts which *Culbertson* set forth as indicative of the intent of the parties to join together in the conduct of an enterprise in good faith and acting with a business purpose, concluded (R. 278) "that the parties involved at no time really and truly intended Dora to be a bona fide partner in carrying on the business of the Portland and Seattle partnerships" and that E. Royce (R. 287) "did not in good faith and acting with a business purpose intend to join together with Eunice or the trust of which she was beneficiary as partners in the present conduct of the Seattle partnership."

The determination of this matter of intent is, of course, a question of fact. *Culbertson*, pp. 742-743. As such, the decision of the Tax Court must be affirmed if it cannot be shown to be "clearly erroneous." *Toor v. Westover*, 200 F. 2d 713 (C.A. 9th); *Wisdom v. United States*, 205 F. 2d 30 (C.A. 9th); *Harkness v. Commissioner*, 193 F. 2d 655 (C.A. 9th); *Smith v. Westover*, 237 F. 2d 201 (C.A. 9th). To reverse, the court must, as stated in *Toor v. Westover*, *supra*, p. 717, be—

left with a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum*, 1948, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746; see *Grace Bros., Inc. v. Commissioner*, 9 Cir., 1949 173 F. 2d 170, 173-174.

The facts concerning the Yellow Cab partnerships of Portland and Seattle provide ample evidence that the Tax Court did not make any such mistake in the instant cases.

C. The wife Dora's purported partnership interests

The Tax Court, as stated above, in arriving at its findings, duly examined the factors which the Supreme Court in *Culbertson* suggested throw light on the true intent of the parties. These factors can be discussed under three headings: First, the circumstances incident to Dora's supposed entry into the partnership; second, the extent of services performed and of management and control which she exercised over her purported interest; and third, the extent to which she had the use and enjoyment of distributions of the partnership.

1. Circumstances incident to entry

For a long time prior to the formation of both partnerships, the taxpayer E. Royce and his associates were stockholders of the corporations which ran the Yellow Cab business in Portland and Seattle. The partnerships were formed under the same style and name on August 1, 1942, and May 1, 1944, respectively, to operate the businesses conducted by the corporations. The corporations were dissolved

and the assets transferred forthwith to the partnerships; the conduct of businesses remained unchanged and the same persons continued to operate and control the businesses as they had done before the formation of the partnerships. The only change was the addition of Dora Royce and Isabelle Royce,¹⁰ now deceased, the wife of B. Royce, as purported members of the Portland partnership and the addition of Dora and E. Royce as trustee for Eunice as purported members of the Seattle partnership.

Dora's capital contribution came from her husband in the form of donated stock of the corporations intended for dissolution. It is quite clear that her husband made the gifts of stock pursuant to and in anticipation of the plan to dissolve the corporations and transfer the assets to the partnerships. Even more significant, however, is the fact that the stock transfers were made contingent upon her joining the partnerships and for the sole purpose of qualifying her for admission thereto.¹¹ (R. 277.) It is clear

¹⁰ The Commissioner made no determination in regard to Isabelle's partnership interest since Isabelle and B. Royce lived in Washington, a community property state, during the taxable years, and the income received by them constituted community income equally divisible between them.

¹¹ On direct examination E. Royce testified as follows concerning the Portland gift (R. 428-429):

Q. * * * Now, when you gave—when you gave the stock certificate to Mrs. Royce, what was your intention with respect to the gift?

A. I intended that she become a partner in the company.

Q. Well, was the gift—was the gift—have any con-

that it was not Dora's decision to become a partner, but that of her husband. There is no evidence that she played any part whatsoever in formulating the terms of either of the partnership agreements.

In addition, all indications are that there were no business purposes for taking Dora into the partnerships. The Supreme Court has said that to be a valid

ditions to it, of any kind?

A. None whatever.

Q. Was it—was she obligated to become a partner in the company, when you gave it to her?

A. Yes.

Then on cross-examination he testified (R. 450):

Q. Now, you—all right—you testified on direct examination, that when you turned over the stock to your wife, Dora Royce, you intended her to become a partner in the company?

A. That's right.

Q. And you stated that she was morally obligated to become a partner? A. Yes.

Q. You wouldn't have given her the stock, if she hadn't felt that way about it—if she hadn't felt that she was obligated to become a partner?

A. Well, she—she was—being as she was of so much help to me, and so on, that I felt morally obligated to do it.

Q. That was the purpose of giving—making the gift of stock? A. To make her a partner.

Q. That's right. A. That's right.

Subsequently, after the noon recess E. Royce sought to retract the above testimony in answering questions relating to the Seattle partnership. (R. 464.) On the next day, when he was recalled to the witness stand by his attorneys, he repudiated his former testimony, saying that the gift of stock in each instance was made (R. 569) "without any condition whatever. It was an outright gift. I was in hopes that she would become a partner, but she was under no obligation to do so."

partnership for tax purposes the parties must intend to join together in good faith "and acting with a business purpose." *Commissioner v. Culbertson*, *supra*, p. 742. While it is perfectly permissible to conduct business in such a way as to minimize taxes, the adoption of a family partnership for the sole purpose of splitting income is not acting with a business purpose, for "keeping down taxes is not of itself 'business'." *Slifka v. Commissioner*, 182 F. 2d 345, 346 (C.A. 2d): Accord: *Smith v. Westover*, 237 F. 2d 201 (C.A. 9th); *Parker v. Westover*, 248 F. 2d 490 (C.A. 9th). The fact that E. Royce felt "morally obligated" to give his wife stock because she had been of so much help to him (R. 450) does not, of course, constitute a business purpose for her entry into the partnerships. See *Parker v. Westover*, 248 F. 2d 490 (C.A. 9th); *Smith v. Westover*, *supra*; compare *Pike v. United States*, 231 F. 2d 688 (C.A. 9th); *Brodhead v. Commissioner*, 18 T.C. 726, affirmed *per curiam*, 210 F. 2d 652 (C.A. 9th); *Forman v. Commissioner*, 199 F. 2d 881 (C.A. 9th).

2. Services performed, management and control

Dora did not contribute any services or substance or participate in the actual management and control of either partnership. The Tax Court found that she "performed certain relatively inconsequential services for the Portland firm, similar services for the Seattle partnership being performed by an employee." (R. 277.) These services comprised checking cabs and drivers, and were of such a nature that

they could be performed while shopping downtown or driving along the street.¹²

Both Dora and E. Royce testified that she participated in the management and control of both partnerships. This testimony, of very interested witnesses, however, did not bind the Tax Court to accept their statements as whole gospel. This is particularly true when Dora's testimony on cross-examination is scrutinized. It reveals that except for occasional discussions with her husband she was never actively engaged in the business of the partnerships. Thus, she was unable to discuss the business conferences supposedly attended by her, except in very general terms.¹³ Her interest in the business was no more than that of any wife in her husband's enterprises. It is apparent that Dora did not exercise any real dominion or control over her so-called in-

¹² Inconsistent with Dora's testimony that she performed important services are the statements in certain of the partnership returns signed and sworn to by E. Royce indicating that Dora performed no services for the partnerships. (R. 277.)

¹³ To illustrate, on one occasion she testified as follows (R. 544) :

Q. Would you give the Court an illustration of some of the decisions that were made at these conferences?

A. I don't know as I remember them offhand.

* * * *

Q. You understood my question, did you not? I asked you to give the Court an illustration of some of the conferences that were held and some of the decisions that were made at those conferences at your home?

A. You just an illustration of what I—I don't know as I can remember what those were at this time.

vestments and did not "through that control influence[d] the conduct of the partnership and the disposition of its income." *Commissioner v. Culbertson*, *supra*, p. 747.

3. Enjoyment of income and capital distributions

One of the most important criteria in determining whether a wife is a genuine partner in a business is whether she "is free to, and does, enjoy the fruits of the partnership." *Commissioner v. Culbertson*, *supra*, p. 747; *Sellers v. Commissioner*, 218 F. 2d 380 (C.A. 9th). There is no doubt that E. Royce controlled the partnership earnings distributed to his wife. During the taxable years Dora withdrew from the two partnerships a total of \$262,427.41. (R. 272-273.) Of this amount no more than \$39,900 was applied in payment of so-called personal expenditures which accrued solely on her behalf and it should be noted that this figure includes \$8,000 for two automobiles and \$18,000 for house improvements. (R. 275.) For the remaining part, the withdrawn amounts were, except for funds used to pay state and federal income taxes, used by her husband for his own personal requirements.

Still another indication of the husband's dominion and control over these funds is found in examining the partnership checks payable to Dora. (Exs. 40, 43.) Checks in the aggregate amount of \$60,307.75 were endorsed in blank by her and all other checks were endorsed in blank both by Dora *and by E. Royce*. (R. 273.) No valid reason was given at the

hearing for her endorsing the checks over to her husband.¹⁴

D. Eunice (or her trust) was not a bona fide member of the partnership

The Commissioner does not contend that a trust for the benefit of minor children set up with gift capital may never be a bona fide member of a partnership. Indeed, this Court in *Pike v. United States*, 231 F. 2d 688, has held such a partnership valid. However, in *Pike* the Court found that on the facts there was a valid business purpose for the formation of the partnership. Such a purpose does not exist at all in this case, and, in fact, the taxpayer nowhere in his brief on appeal attempts to set forth any such business purpose. It is clear that a fatherly desire to provide for the future of a child, while admirable, does not constitute a business purpose. *Smith v. Westover*, *supra*; *Sellers v. Commissioner*, *supra*; *Parker v. Westover*, *supra*.

That there was no bona fide intent to make the trust a partner becomes quite apparent when the trust instrument and the disposition of the trust's purported share of partnership earnings are considered. The Declaration of Trust discloses that E. Royce, both the settlor and named trustee, had broad

¹⁴ E. Royce's explanation, if it may be so designated, indicates that he accompanied his wife to the bank whenever she received a check; that he did this at her request; and that the bank tellers, presumably out of an abundance of caution, required both her and his signatures on the back of each check as a condition to cashing it. (R. 610.)

powers to control the management and investment of the trust corpus. He proceeded to exercise such powers by investing \$94,100 in unsecured "loans" to himself and \$281.25 in governmental or other conventional securities. (R. 285.) Under the instrument he had sole discretion as to whether or not any part of the partnership earnings should be paid over to his daughter or accumulated for her use and benefit. In practice during the five years in question he paid out \$2,200 to his daughter, which amount was largely used to pay her living and other personal expenses while attending college. (R. 284.)

The trust instrument did not require any payment over to Eunice. At the time of her thirty-fifth birthday, "if, in the judgment of the trustee" she "desires to receive the corpus * * * and she is considered * * * capable of managing the trust estate wisely," such a payment might be made. (R. 281-282.) It is apparent that E. Royce had untrammelled control over the "trust" income and that he used it for his own benefit. The largest withdrawals from the trust account except for the payment of income taxes were for his personal uses. The "loans" to E. Royce aggregated \$94,100 on December 31, 1949. Of this amount \$7,100 was loaned to Royce, Inc., and the balance of \$87,000 to E. Royce personally. E. Royce was the principal stockholder of Royce, Inc. The loan to Royce, Inc., was repaid in 1950, those to Royce personally have not been repaid. (R. 285-286.)

While the form of the Declaration of Trust and the partnership agreement were perfectly satisfac-

tory, in substance they effected no change whatsoever in the business of the partnership or in the disposition of the profits realized therefrom. Such a sham patently fails to meet the requirement of *Culbertson* (p. 747) that the so-called partner "enjoy the fruits of the partnership." The contention that the trust was a valid partner in the Seattle partnership for tax purposes is clearly without merit; the partnership arrangement in respect of the trust was merely a paper re-allocation of income. Cf. *Smith v. Westover*, *supra*; *Parker v. Westover*, *supra*; *Harvey v. Commissioner*, 227 F. 8d 526 (C.A. 6th); *Economos v. Commissioner*, 167 F. 2d 165 (C.A. 4th), certiorari denied, 335 U.S. 826; *Zander v. Commissioner*, 173 F. 2d 624 (C.A. 5th); *Stanback v. Robertson*, 183 F. 2d 889 (C.A. 4th); *Feldman v. Commissioner*, 186 F. 2d 87 (C.A. 4th).

E. All of the partnership interests in question are properly taxable to E. Royce

From the foregoing it is submitted that the Tax Court was correct in finding that Dora and E. Royce "at no time really and truly intended Dora to be a bona fide partner in carrying on the business of the Portland and Seattle partnerships." (R. 278.) Equally correct was the holding "that Eunice Royce was not a bona fide partner in the partnership." (R. 286.) These findings of fact are not "clearly erroneous" (*Smith v. Westover*, *supra*), since it is apparent that "no real change in the economic or financial status of the * * * family was affected by the partnership" (*Parker v. Westover*, *supra*, p. 492).

CONCLUSION

The decisions of the Tax Court from which the taxpayers here petition for review are all correct and should be affirmed.

Respectfully submitted,

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APRIL, 1958

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) [As amended by Sec. 166(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Dividend*.—The term "dividend" when used in this chapter (except in section 201 (c) (5), section 204 (c) (11) and section 207 (a) (2) and (b) (3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other

property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

* * * *

(c) *Distributions in Liquidation*.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, * * *

* * * *

(g) *Redemption of Stock*.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * *

(i) *Definition of Partial Liquidation*. — As used in this section the term “amounts distributed in partial liquidation” means a distribu-

tion by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * *

(26 U.S.C. 1952 ed., Sec. 115.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

28 U.S.C.:

SEC 1732 [as amended by Secs. 1 and 3, Act of August 28, 1951, c. 351, 65 Stat. 205]. *Record made in regular course of business; photographic copies.*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

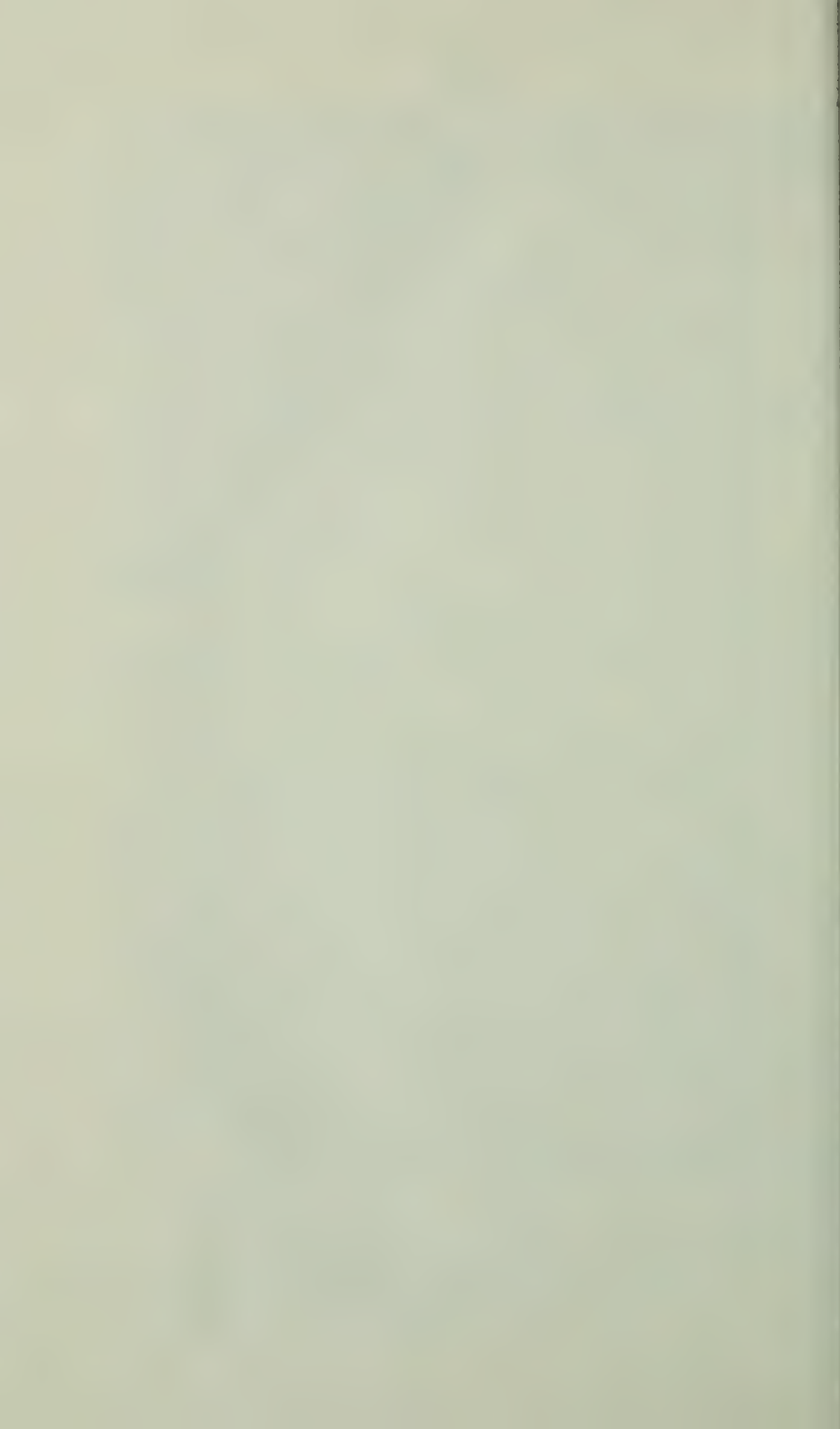
All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

* * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.115-9. DISTRIBUTION IN REDEMPTION OR CANCELLATION OF STOCK TAXABLE AS A DIVIDEND.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. * * *



IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15724

FRED C. NIEDERKROME, E. ROYCE, DORA F. ROYCE, EZRA ROYCE, B. ROYCE, ESTATE OF ISABELLE H. ROYCE, DECEASED, B. ROYCE, Executor, ROBERT T. JACOB, AGNES C. JACOB, ALBERT L. SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petitions for Review of the Decisions of the
Tax Court of the United States

BRIEF FOR PETITIONERS

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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15724

FRED C. NIEDERKROME, E. ROYCE, DORA F. ROYCE, EZRA ROYCE, B. ROYCE, ESTATE OF ISABELLE H. ROYCE, DECEASED, B. ROYCE, Executor, ROBERT T. JACOB, AGNES C. JACOB, ALBERT L. SCHNEIDER and BERTHA SCHNEIDER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR PETITIONERS

OPINION BELOW

The memorandum opinion of the Tax Court (R. 216-296) is not officially reported.

JURISDICTION

These consolidated cases involve asserted deficiencies in individual income taxes and additions to taxes under section 294(d)(2) of the Internal Revenue Code of 1939. The decisions of the Tax Court were entered on April 2, 1957, and redetermined deficiencies as follows (R. 296-302):

Petitioners	Taxable Years	Income Taxes	Additions to Taxes
Fred C. Niederkrome	1945	\$ 32,348.48	\$1,940.07
E. Royce and Dora F. Royce	1948	22,191.08	
	1949	22,453.94	
Ezra Royce	1944	54,875.50	
	1945	269,786.82	
	1946	127,263.95	
	1947	76,771.18	4,882.58
B. Royce	1945	17,795.86	
Estate of Isabelle H. Royce	1945	29,308.54	
Robert T. Jacob and Agnes C. Jacob	1945	66,977.56	4,035.66
Albert L. Schneider and Bertha Schneider	1945	21,157.87	1,102.38

Petitions for review were filed on July 1, 1957. The jurisdiction of this Court is invoked under sections 7482 and 7483 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

The following questions are presented:

(1) Whether any portion of the \$350,000 paid by Oregon Motor Stages to L. R. Bentson in retirement of all his stock, or any portion of the incidental disbursements paid by Oregon Motor Stages, is taxable as a dividend to each of the other stockholders of the corporation.

(2) Whether the sum of \$20,000 advanced by Hippodrome Amusement Company to the petitioner E. Royce is taxable to him as a dividend.

(3) Whether the petitioner E. Royce is taxable with respect to the income of a partnership doing business as Yellow Cab Company, in Portland, Oregon, which was distributable to his wife Dora F. Royce.

(4) Whether the petitioner E. Royce is taxable with respect to the income of a partnership doing business as Yellow Cab Company, in Seattle, Washington, which was distributable to his wife Dora F. Royce.

(5) Whether the petitioners E. Royce and Dora F. Royce are taxable with respect to the income of a partnership doing business as Yellow Cab Company, in Seattle, Washington, which was distributable to a trust for the benefit of their daughter Eunice M. Royce.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 1a-4a.

STATEMENT

These consolidated proceedings involve nine taxpayers. E. Royce and Dora F. Royce, Robert T. Jacob and Agnes C. Jacob, and Albert L. Schneider and Bertha Schneider are, respectively, husband and wife. B. Royce and Isabelle H. Royce were husband and wife before her death. (R. 220-221.)

The petitions for review present five basic issues. The facts relating to each issue are separately summarized.

I.

Oregon Motor Stages

Oregon Motor Stages, hereinafter called Stages, was a corporation organized in Oregon, where it operated an intrastate bus line. In June, 1945, its outstanding stock consisted of 750 shares of common stock. L. D. Jones and

T. D. Wilson each owned 250 shares; and R. W. Lemon or members of his family owned the balance. (R. 221.)

In April or May, 1945, Schneider advised E. Royce that the stock of Stages was for sale. (R. 222, 315-316, 336, 353, 362, 387, 401, 592.) E. Royce and Jacob promptly began to negotiate for the purchase of the stock. At the same time they invited others to join them in the purchase. (R. 222, 316, 336-337, 352-353, 363, 366, 387-388, 399, 620-621.) After various discussions B. Royce, Niederkrome and Schneider, together with E. Royce and Jacob, were willing to buy a total of 400 shares at \$1,000 per share. (R. 222, 316, 345, 388.) They all regarded Stages as a good investment. The war had greatly increased its earnings and it had been paying substantial dividends. Military patronage accounted for over half of its revenues. Civilian patronage was a good deal larger because of gas rationing. They expected that the war with Japan would continue for some time and keep the earnings at the same high level. (R. 319-321, 339-340, 349, 352, 369-370, 377, 393-394.)

Since they were unwilling to buy more than 400 shares, they sought additional purchasers for the other 350 shares. (R. 222, 316-317, 337, 352-353, 366, 387-388, 399, 620-621.) They also considered having the corporation acquire the 350 shares, and the attorney for the selling group drafted an agreement for that purpose. (R. 222, 239, 316.) While discussions were going on, L. R. Bentson, an uncle of E. Royce and B. Royce, visited Portland in June. (R. 222, 316-317, 388-389, 402.) Bentson lived in Vancouver, B. C., and came to Portland periodically. (R. 356, 388, 572.) He had once been a successful mining operator in Alaska, and had later gone into a sawmill business. (R. 239, 317, 356, 390, 604.) He was very impressed by the financial success of his nephews, and on various occasions had expressed a desire to go into their business ventures. (R. 328, 390.)

E. Royce mentioned the pending negotiations to Bentson, who then became interested in acquiring the 350

shares. (R. 316-318, 363-364, 388, 390.) As a result, Jacob and Schneider met with Bentson at the home of E. Royce. (R. 317-318, 338-339, 363-364, 381, 389.) Before going into the transaction Bentson asked Schneider to take him over the bus routes. For more than two days they both inspected the routes, checked the operations at each depot, and looked at the various shops and facilities. (R. 328, 364-365, 380.) Bentson examined Stages' records, including profit and loss statements, as well as other data on operating revenues and operating ratios. (R. 328, 365-366, 391.) He also spent several hours with the comptroller of the corporation. (R. 365-366.) Bentson wished to build up an estate for a niece who lived in Portland, and decided that the 350 shares were a good investment toward this end. (R. 328, 391.)

In order to enable Bentson to finance his purchase, Jacob introduced him and E. Royce to George W. Davidson. The latter was vice-president and manager of American Business Credit Corporation, an Oregon corporation doing business in Portland, hereinafter referred to as ABC-Portland. (R. 209, 318, 336, 338, 343, 391, 404, 585.) Bentson applied to ABC-Portland for a loan of \$350,000 and negotiated with Davidson. (R. 391, 403-404, 585.) The loan was approved on two conditions. E. Royce was required to sign the note of indebtedness as an accommodation maker, and the entire 750 shares had to be pledged as collateral. (R. 319, 335, 351, 359, 391-392, 396-397, 404-406.) ABC-Portland imposed these conditions because Bentson was a Canadian citizen. (R. 319, 379, 396-397.) It was felt that if Stages' earnings continued at the same rate, Bentson would be able to make substantial repayments out of distributions. (R. 379, 407.) It was also understood, on the basis of ABC-Portland's practice, that such loans were customarily renewed for a number of years. (R. 340-341, 378.)

The 750 shares were bought on July 2, 1945, at \$1,000 a share. (R. 224-225.) The participants at the closing were

Niederkrome, E. Royce, Jacob, Schneider, Bentson, the sellers Jones and Lemon, the attorney for the sellers, and a representative of ABC-Portland. (R. 321-322, 327, 367, 373, 393.) ABC-Portland issued a check for \$350,000, payable to Bentson and E. Royce. (R. 225; Ex. B.) Bentson then bought a cashier's check in the same amount which he turned over to the sellers. (R. 321-322, 326-327; Ex. 7.) Each of the other purchasers similarly paid for his stock with a cashier's check. (R. 321-322, 325-327, 366-367; Ex. 8.) E. Royce loaned Niederkrome the \$55,000 which he needed for his purchase, and also advanced \$50,000 to Schneider for a few days. (R. 232, 355-356, 366-367, 375, 400, 623.) The sellers transferred the 750 shares to the purchasers as follows: Niederkrome—55; E. Royce—145; B. Royce—50; Jacob—100; Schneider—50; and Bentson—350. (R. 224-225, 322-324.)

All the certificates of stock were immediately endorsed in blank and turned over to ABC-Portland as security for the loan of \$350,000. (R. 225, 319, 323-324, 341, 367-368, 392, 623.) Bentson gave the other purchasers signed receipts for their certificates, stating "such stock being loaned to me to be pledged to American Business Corporation as collateral to loan this day made to me for the purchase of Three Hundred Fifty (350) shares of the common capital stock of said company." (R. 225, 324-325, 341, 368-369, 392-393; Ex. 2-6.) On the same day ABC-Portland was given a note for \$350,000 signed by Bentson and E. Royce. The note was payable in 90 days, bore interest at 5 percent, and was secured by the stock of Stages. (R. 225-227, 391-392; Ex. 1.)

On July 17, 1945, Davidson billed Stages for \$4,315.07, representing a servicing fee for financing the loan. Two days later Stages issued a check in the same amount to Davidson. (R. 227, 332.) The cash receipts report of ABC-Portland, dated July 20, 1945, showed a receipt of \$4,315.07 from E. Royce and Bentson. (Ex. D.) The cash receipts

report of ABC-Portland dated September 17, 1945, showed an advance of \$350,000 to E. Royce and Bentson. (Ex. E.) Monthly statements of ABC-Portland for July, August, and September, 1945, carried an account in the names of E. Royce and Bentson. (Ex. G.)

In late August, 1945, Bentson informed Jacob, Schneider, and E. Royce that he wished to dispose of his stock. The war with Japan had suddenly ended, and he felt that Stages' earnings would decline. Moreover, he was greatly disturbed because he had just learned that his wife had cancer of the throat. (R. 328-329, 371-372, 395, 603-604.) In a letter dated August 31, 1945, Bentson offered to sell his 350 shares to Stages for an amount equal to \$350,000 plus accrued interest on the note held by ABC-Portland. "My object in desiring to dispose of this stock," he wrote, "is that the sudden end of the war has made a great difference to my plans, and on this account I desire to be relieved of my obligation to the said American Business Credit Corporation." (R. 227-228, 329, 409.)

Schneider tried to interest one Rothschild in the 350 shares, but Rothschild did not regard a short-line bus company as a good investment. (R. 385-386.) On September 5, 1945, the stockholders and directors of Stages met to consider Bentson's offer. After reviewing the applicable Oregon statutes and the financial condition of Stages they voted to purchase and cancel the 350 shares held by Bentson. (R. 229-231, 329.) Bentson attended the meeting. (R. 229.) The next day Stages bought and retired the 350 shares, and gave Bentson a check for \$350,000. (R. 231, 329.) Bentson endorsed the check and delivered it to ABC-Portland in discharge of the loan. The payment of \$350,000 was recorded on the books of Stages as a debit to surplus of \$315,000 and a debit to capital stock of \$35,000. (R. 231.) On September 17, 1945, Stages issued to ABC-Portland a check for \$3,739.73, the interest then due on the loan. On April 2,

1946, the authorized capital stock of Stages was reduced from \$75,000 to \$40,000. (R. 231, 331.) The earned surplus of Stages exceeded \$350,000 when the 350 shares were redeemed. (R. 233.)

E. Royce was president of Stages; Schneider was vice-president and general manager; Jacob was secretary; and Niederkrome was treasurer. All four were also directors. Neither Bentson nor B. Royce was ever an officer or director of Stages. Only Schneider was actually active in its affairs. (R. 212, 231-232, 335, 337-338, 348, 360, 362, 374, 407.) On June 20, 1946, Niederkrome sold his stock to Schneider for \$55,000. The Interstate Commerce Commission required Niederkrome to dispose of his stock because he was a director of another carrier. (R. 211-212, 232, 334, 348-349, 351, 356, 360, 375-376.)

Stages' net income and losses for 1945 through 1949 were as follows (Ex. Y, Z, AA, BB, CC):

<u>Year</u>	<u>Net Income or Losses</u>
1945	\$426,168.53
1946	153,318.31
1947	47,413.02
1948	16,911.54
1949	(69,409.01)

Bentson died in April, 1950. (R. 222, 318, 572.) His wife died about 1946. (R. 574.)

The Commissioner determined that the \$350,000 and \$3,739.73 paid on the redemption of Bentson's shares, and the \$4,315.07 previously paid to ABC-Portland, were taxable as dividend income to the other five stockholders—Niederkrome, E. Royce, B. Royce, Jacob and Schneider—or, in the alternative, to E. Royce alone. (R. 219, 236-237.) The Tax Court held that the sums in question were taxable to the five stockholders. (R. 236-244.)

II.

Hippodrome Amusement Company

Hippodrome Amusement Company, hereinafter called Hippodrome, is an Oregon corporation. In 1945 it owned improved and unimproved property at Seaside, Oregon. Most of the improved property was devoted to rental purposes, and the balance was used as a dance hall. (R. 257-258.) The outstanding stock of Hippodrome consisted of 353 shares. The stockholders were E. Royce, B. Royce, Niederkrome, and Stephen Bartle, who owned, respectively, 218, 111, 19, and 5 shares. All except Bartle were directors. E. Royce was president, and Niederkrome was secretary and auditor. (R. 258.)

On December 28, 1945, Hippodrome gave E. Royce a check of \$20,000. (R. 258.) Before the check was issued, E. Royce conferred with B. Royce and Niederkrome. He stated that he wished to borrow \$20,000 from Hippodrome, and that he would return the money when the corporation needed it. (R. 495-496.) B. Royce and Niederkrome consented to the advance on this basis. (R. 258, 412-413, 420, 495-496, 521-522, 566-567.) The disbursement was recorded on the corporate books by debiting an account receivable, entitled "Due from Stockholders," and crediting the cash account. (R. 258; Ex. 33, 34.) E. Royce did not execute any note or other evidence of indebtedness. (R. 258.) At the time of the hearing he had not yet repaid the \$20,000. (R. 258-259.)

In 1948 Hippodrome disbursed \$400 to Niederkrome. This sum was also charged to the account receivable entitled "Due from Stockholders." Niederkrome did not execute any note or other evidence of indebtedness. He had not repaid the \$400 at the time of the hearing. (R. 59.)

On April 1, 1954, Niederkrome opened new accounts on the books of Hippodrome, entitled "Notes Receivable—

E. Royce" and "Notes Receivable—F. C. Niederkrome." He debited these accounts in the respective sums of \$20,000 and \$400, and closed out the "Due from Stockholders" account. (R. 259-260; Ex. 34.)

Hippodrome operated at a loss before the war and carried a deficit for about 10 years in the 30's. (R. 260.) During that period E. Royce and B. Royce helped out by advancing moneys to it. The corporation never gave any notes for those loans. (R. 260, 495, 521-522.) By 1945 its financial condition had substantially improved. (R. 260.) Hippodrome operated on the basis of a fiscal year ending March 31st. (R. 260.) On March 31, 1945, its earned surplus was \$16,576.34. Its earnings for the year ending March 31, 1946, were \$5,127.06, and its earned surplus as of that date was \$21,703.40. (R. 260.)

In 1945 Hippodrome had no building program or plans for immediate expansion. (R. 260.) In 1948 or 1949 it made plans to build a ticket office and terminal for Stages. However, the project did not materialize. (R. 260-261.) In 1954 Hippodrome entered into negotiations with the Post Office Department to erect a post office building on its unimproved property. It had a preliminary sketch for the building prepared, but the negotiations eventually fell through. (R. 261.) At the time of the hearing Hippodrome was discussing the construction of new bus facilities with Pacific Greyhound, the largest motor operator on the West Coast. (R. 261.)

Since 1945 Hippodrome has not needed the \$20,000 which it advanced to E. Royce. (R. 419, 423.) If the negotiations with the Post Office Department had succeeded, the corporation would have required the sums disbursed to E. Royce and Niederkrome. (R. 419, 423, 501, 522, 524-526.) During those negotiations the stockholders considered the return of the \$20,000 and the \$400. (R. 501, 524-526.) At all times E. Royce and Niederkrome have intended to repay the advances when the corporation needs

the money, and at all times repayment has been expected. (R. 419-420, 496, 501-502, 526, 567.)

Neither B. Royce nor Bartle has ever received any advances from Hippodrome. There have been no withdrawals by stockholders, apart from the \$20,000 disbursed to E. Royce in 1945 and the \$400 disbursed to Niederkrome in 1948. (R. 500-501.)

The Tax Court held that the \$20,000 received by E. Royce from Hippodrome was taxable to him as a dividend. (R. 261-262.)

III.

Portland Partnership—Dora F. Royce

Before August 1, 1942, Yellow Cab Incorporated was an Oregon corporation engaged in the taxicab business in Portland, Oregon. (R. 263.) E. Royce owned about 49 percent of its outstanding stock. (Ex. 25.) On July 31, 1942, he transferred 14,000 shares, or slightly less than half of his stock, to his wife Dora F. Royce. (R. 263, 428.) On August 1, 1942, the corporation was liquidated and dissolved at a stockholders' meeting attended by Dora as well as other stockholders. (R. 263, 428, 446, 503-504, 533, 564-565.) On the same date all the stockholders formed a partnership, known as Yellow Cab Company, to operate the business previously conducted by the corporation. (R. 263-266, 428, 504, 533-534.)

All the prior stockholders signed articles of partnership. The parties to the agreement were E. Royce, B. Royce, Charles W. Keffer, C. H. Luton, Dora F. Royce, and Isabelle H. Royce. Under the terms of the agreement the partners assumed the liabilities of the corporation. The partnership was to "continue for the duration of the joint lives of the parties," unless otherwise dissolved by them. The stated capital of the partnership consisted of the assets formerly owned by the corporation, plus undistributed income and profits. The respective inter-

ests of the partners were specified as follows: F. Royce—26.1575% ; B. Royce—26.1575% ; Keffer—.659% ; Luton—.906% ; Dora—23.06% ; and Isabelle—23.06%. Profits and losses were to be shared by the partners in proportion to their relative interests. Each partner had “an equal voice in the control of the business and operation of the partnership.” The partnership was required “to keep accurate books of account,” which were to be open to all the partners. Upon dissolution of the firm the surplus was to be divided among them according to their interests. (R. 263-266, 428-429, 507-508, 533-534; Ex. 25, 26.)

The opening journal entry of the partnership recorded the partners' capital accounts as follows (R. 506-508; Ex. 29, 30):

E. Royce	26.1575%	\$21,295.23
B. Royce	26.1575%	21,295.23
Charles H. Keffer	.659%	536.50
C. H. Luton	.906%	737.59
Dora F. Royce	23.06%	18,773.51
Isabelle H. Royce	23.06%	18,773.51

On December 3, 1942, the partnership filed an Assumed Business Name Certificate dated August 2, 1942. The Certificate listed six partners, including Dora, who signed the certificate. (R. 446, 534; Ex. 27.) On November 28, 1942, E. Royce and B. Royce purchased the interests of Luton and Keffer. (R. 266.)

E. Royce worked at the office, shop, and garage, where he made the everyday decisions. (R. 427, 451-452, 485.) On the average, he spent about half of his working time there. His other ventures absorbed the balance of his time and attention. (R. 485.) He also regularly handled those affairs at the office of the partnership. (R. 485-486.) B. Royce was inactive in the business. (R. 272, 518.)

Dora and E. Royce were married in 1923. (R. 387, 427, 527.) She was a woman of substantial business experi-

ence. Before marriage she had been a millinery designer and held positions of responsibility. Her business background included the executive supervision of employees, as well as control of overhead and other expenses. (R. 447-448, 527-528.) She regularly rendered services to the partnership as a checker. She checked the conduct of the drivers, the appearance of their uniforms, the condition of the cabs, and the number of passengers carried. She performed these services at hotels, stands, depots and other places where cabs regularly picked up or discharged passengers. Her observations were recorded in reports which she filed at the office. (R. 429-430, 451, 452, 487-488, 529-530, 536, 542-543.) The hours devoted by Dora to her checking duties varied. Often she would work all day. On other occasions she would work less. At times she did her checking in the evening. She was experienced in her work because she had performed the same services for the prior corporation. (R. 427, 430, 452, 530.) Her work was important to the business, and called for a person of experience and responsibility. (R. 430, 450-451, 484-485, 542.) Now and then E. Royce did some checking. (R. 451.) In the absence of Dora's services the partnership would have had to employ a checker to do her work. (R. 272, 467-468, 484-485.) Dora also attended partners' conferences, expressed her views, and kept herself informed about the business. (R. 445, 447, 536, 565-566.)

The drawing accounts of Dora and E. Royce on the books of the partnership show the following withdrawals during the taxable years 1944 through 1947:

Year	Dora	E. Royce
1944	\$ 48,777.75	\$ 58,184.94
1945	69,180.00	80,820.00
1946	48,865.01	57,086.99
1947	4,612.00	5,388.00
Total	\$171,434.76	\$201,479.93

At the end of 1947 the accumulated earnings distributable to Dora exceeded her withdrawals by \$35,434.76, and those distributable to E. Royce exceeded his withdrawals by \$38,395.26. (R. 272-273.) Whenever there was a distribution of profits, Dora received her share. (R. 430, 454.) All distributions to her were in the form of checks payable to her. (R. 273.)

Dora maintained a separate checking account at The First National Bank of Portland. (R. 273-274, 431, 535.) She never had a joint checking account with her husband. (R. 449, 455, 536.) The deposits to and withdrawals from her account for the years 1944 through 1947 were as follows (R. 274):

Year	Deposits	Withdrawals
1944	\$ 21,386.75	\$ 22,507.83
1945	38,712.25	36,114.11
1946	73,491.78	71,563.02
1947	46,485.00	50,106.19
Total	\$180,075.78	\$180,291.15

Dora endorsed all her distribution checks. (R. 273.) Part of the proceeds was directly deposited to her account. A substantial portion was placed in her safe deposit box. At one time she had about \$65,000 there. (R. 547-550, 570, 611.) Much of the cash set aside in her box was then used by her or deposited to her account. (R. 550, 570.) A number of the checks were endorsed by E. Royce as well as Dora, because the bank required his signature when she cashed them. (R. 610.)

Dora exercised her own judgment in spending or investing her funds. (R. 466-467, 535-536, 552-553.) Of her distributions from the Portland partnership and the Seattle partnership, considered at pp. 15-19, *infra*, she spent about \$1,850 for two fur coats, \$8,000 for two Chrysler automobiles, \$350 for an exercycle, \$1,800 for silverware, and \$400 for lace cloth. In addition, she bought a Ply-

mouth and Cadillac, purchased various furnishings for the home, acquired several hundred dollars worth of books, and spent about \$18,000 in improvements of the house. (R. 275, 431-433, 467, 531-533.) E. Royce provided for ordinary household expenses, such as food, light, heat, groceries, insurance, and taxes. (R. 433-434, 533.)

Dora invested \$7,000 in Government bonds and \$2,500 in Missouri-Pacific stock. (R. 275, 433, 456.) These securities were acquired in her own name. (R. 455-456.) She also loaned about \$70,000 to E. Royce to be invested in Alder Gold-Copper Company. (R. 275, 456-463, 542, 552.) E. Royce was interested in the promotion of that corporation. In 1949 he acquired about 5 percent of its common stock. (R. 214-215, 457-458, 460-463, 484, 489, 551-552; Ex. 45-SSSS, 46-TTTT, 47-UUUU.) Dora also had stock in the corporation. (R. 457-458.)

The Commissioner determined that Dora was not "a bona fide partner" in the Portland partnership, and taxed her share of the partnership profits for the years 1944-1947 to petitioner E. Royce. The Tax Court sustained the determination and the resulting deficiencies. (R. 275-278.)

IV.

Seattle Partnership—Dora F. Royce

Yellow Cab Company of Seattle was a Washington corporation which conducted a taxicab business in Seattle. (R. 266.) Its shares of outstanding stock were owned as follows (R. 266):

W. L. Rothschild	607½
J. A. Baldi	606
Geo. E. Worster	606
D. N. Newton	606
E. Royce	1,402½
B. Royce	1,402½
A. H. Wenck	269½
	<hr/>
	5,500

On April 20, 1944, E. Royce transferred 402½ shares to Dora and 700 shares to himself as trustee for his daughter Eunice M. Royce. (R. 267.) E. Royce duly filed a gift tax return covering both gifts of stock, and paid a gift tax of \$1,568.11. (R. 267; Ex. 16.)

On May 1, 1944, the corporation was liquidated and dissolved. (R. 266.) Dora attended the stockholders' meeting at which the dissolution was voted. (R. 446, 539-540, 616; Ex. 17.) On the same day the former stockholders and L. S. Ackerman signed Articles of Copartnership in order to carry on the business previously conducted by the corporation. In addition, they all executed a Certificate of Assumed Name, which was filed on June 12, 1944. Dora signed both documents. (R. 266-271, 437-438, 446, 540, 564-565; Ex. 19.) The Articles of Copartnership created a partnership, known as Yellow Cab Company, for a term of five years. The partnership was to continue for similar successive periods unless any party gave notice to the contrary. The capital of the business consisted of the assets of the dissolved corporation, subject to its liabilities, which the partners assumed. (R. 267-269.)

Wenck was designated managing partner at a monthly salary "determined from time to time by the partners." Apart from Wenck's duties as manager, the agreement provided that "decisions as to partnership matters shall be made by a majority in interest of the partners." B. Royce, E. Royce, Rothschild, and Baldi agreed to devote as much time to the business as they deemed necessary. Rothschild and Baldi were to serve without compensation. B. Royce and E. Royce were each to receive 2½ percent of the net profits, but not exceeding \$5,000. The balance of any profits and all losses were to be shared as follows:

Name	Fraction
B. Royce	1402½
	5500
E. Royce	300
	5500
E. Royce, Trustee for E. M. Royce	700
	5500
D. F. Royce	402½
	5500
A. H. Wenck	269½
	5500
W. L. Rothschild	485½
	5500
J. A. Baldi	485
	5500
G. E. Worster	485
	5500
D. N. Newton	485
	5500
L. S. Ackerman	485
	5500

No withdrawals of capital or payments of profits could "be made by or to any partner unless such withdrawals or payments" were "uniform as to all partners in proportion to their respective interests" and "authorized by decision of the partners." The agreement further re-

quired the partners to "act in the highest good faith toward each other." (R. 269-271; Ex. 18.)

The opening journal entry of the partnership recorded the partners' capital accounts as follows (Ex. 20):

B. Royce	\$79,902.18
E. Royce	17,091.23
E. Royce, Trustee for E. M. Royce	39,879.96
D. F. Royce	22,930.99
A. H. Wenck	15,353.76
W. L. Rothschild	27,659.32
J. A. Baldi	27,631.11
G. E. Worster	27,631.11
D. N. Newton	27,631.11
L. S. Ackerman	27,631.11

Wenck actively managed the business in accordance with the partnership agreement. (R. 438-439, 541, 615-616.) E. Royce visited the office infrequently. (R. 438, 541, 617.) Dora was there a little more often. (R. 617.) When she was in Seattle, she checked the cabs and drivers, and filed reports with Wenck. (R. 439, 540-541, 617-618.) She kept herself informed about the business. (R. 445.) While in Seattle she participated in partnership conferences and discussed business affairs with Wenck. (R. 439, 447, 540, 617.) An employee regularly performed the same services as Dora contributed to the Portland partnership. (R. 467-468.)

For the years 1945 through 1949 the withdrawals of Dora and E. Royce from the Seattle partnership were as follows:

Year	Dora F. Royce	E. Royce
1945	\$41,622.53	\$30,994.97
1946	19,662.53	14,644.97
1947	12,342.53	9,194.97
1948	12,342.53	9,194.97
1949	5,022.53	3,744.97
Total	\$90,992.65	\$67,774.85

At the end of 1949 the accumulated earnings distributable to Dora and E. Royce exceeded their withdrawals by the respective amounts of \$18,733.16 and \$14,008.75. (R. 272-273.) Dora received her proportionate share of distributions together with the other partners. (R. 439-440, 465-466, 619.) At the time of trial the partnership had suffered losses for two years. Dora's account was charged with her share of the losses. (R. 621.)

All partnership distributions to Dora were made by checks payable to her. (R. 465, 618-619.) She handled the checks in the same manner as those received from the Portland partnership. (R. 541.) See pp. 14-15, *supra*.

The Commissioner determined that Dora was not "a bona fide partner" in the Seattle partnership, and taxed her share of the partnership profits for the years 1945-1947 to petitioner E. Royce. The Tax Court sustained the determination and the resulting deficiencies. (R. 275-278.)

V.

Seattle Partnership—Trust for Eunice M. Royce

On April 20, 1944, E. Royce executed a declaration of trust with respect to 700 shares of stock in Yellow Cab Company of Seattle. (R. 267, 278.) E. Royce was the designated trustee and his daughter Eunice M. Royce was the beneficiary. The trust instrument provided that the net income was to be distributed to Eunice or accumulated for her use and benefit "as her absolute and separate property for and during the term of her natural life, or until this trust is sooner terminated" by the grantor's death or as otherwise provided. After Eunice became 35, she was to receive the corpus if the trustee or successor trustee considered her "capable of managing the trust estate wisely." E. Royce, as trustee, had broad administrative powers to sell, invest, and reinvest. (R. 278-282.) On the same date E. Royce, as trustee for Eunice, voted to dissolve Yellow Cab Company of Seattle, and signed the

Articles of Copartnership and the Certificate of Assumed Name of the successor partnership. (R. 267-271, 437-438; Ex. 19.)

Eunice was about 15 when the trust was created. (R. 267, 435.) Until 1947 she lived at home. (R. 443.) From 1947 to 1951 she attended the University of Oregon. From March, 1952 to March, 1954 she worked for the Imperial Travel Bureau. On June 12, 1954, she was married. (R. 282.)

The drawing account of E. Royce, trustee for E. M. Royce, on the books of the partnership shows the following withdrawals during the years 1944 through 1949 (Ex. 21):

<u>Year</u>	<u>Amount</u>
1944	\$46,922.49
1945	72,382.49
1946	34,192.49
1947	21,462.49
1948	21,462.49
1949	8,732.49
Total	\$205,154.94 ¹

At the end of 1949 the earnings distributable to E. Royce, as trustee, exceeded the withdrawals by \$32,592.59. This excess amount was retained in the business. (R. 283.) E. Royce, as trustee for Eunice, received a proportionate share of the distributions from the partnership. (R. 439-440, 471-472, 618.) All the distributions made to him as trustee were in the form of checks payable to him as trustee. (R. 471-472, 618-620.) At the time of trial the partnership

¹ The Tax Court finds that the total withdrawals were \$205,154.94, but it erroneously lists the distributions for the years 1944 through 1947 as \$16,422.49, \$77,422.49, \$46,922.49, and \$34,192.49. (R. 283.) These amounts are not in accord with Exhibit 21, from which the Tax Court derived its related findings on the distributions to Dora and E. Royce. See p. 18, *supra*. Exhibit 21 indicates the distributions to the trust, as well as Dora and E. Royce.

had suffered losses for two years. The trust's account was charged with its share of the losses. (R. 621.)

E. Royce deposited all the distributions in a trust account at The U.S. National Bank. (R. 283, 440, 512-513.) The account was in the name of E. Royce, Trustee for E. M. Royce. (R. 439.) During the years 1944 through 1949 Eunice had a personal checking account in The First National Bank. Over several years E. Royce transferred \$2,200 from the trust account to her personal account. (R. 284.) She drew on the personal account as she pleased for expenses while at college. (R. 448, 556-557.) The checks issued on the trust account during the years 1944 through 1949 totalled \$186,046.21, leaving a balance of \$19,108.73. (R.284.) They were directed to the following purposes (R. 284-285):

Payment of Federal and state taxes	\$89,464.96
Purchase of Government bonds	281.25
Transfer to Eunice's personal account	2,200.00
Loans to Royce, Inc.	7,100.00
Loans to E. Royce	87,000.00
Total	<u>\$186,046.21</u>

E. Royce signed the checks on the trust account as E. Royce, Trustee for E. M. Royce; E. Royce, Trustee; or E. M. Royce, E. Royce Trustee. (Ex. 38.)

Royce, Inc. owned the Columbia Athletic Club Building. (R. 285.) E. Royce owned 50 percent of its stock and two other individuals owned the other 50 percent. (R. 479.) The loans to Royce, Inc. were made in 1948 and 1949, and repaid with interest in 1950. (R. 285, 478-479.) The loans to E. Royce were made in 1945 and 1946, and are evidenced by three renewal notes payable to Eunice and bearing interest at 3 percent. (R. 285, 441-442, 483-484; Ex. 39.) In 1953 and 1954 E. Royce paid \$5,515 on two of the notes, leaving a balance of \$81,485.00. (R. 286, 442.)

The Commissioner taxed to E. Royce the trust's share of the partnership profits for the years 1945-1949. The Tax Court sustained the determination. (R. 286-289.)

SPECIFICATION OF ERRORS

The Tax Court erred:

1. In holding and deciding that for the taxable year 1945 a portion of the amount paid by Oregon Motor Stages to L. R. Bentson in retirement of all his stock is taxable as a dividend to each of the petitioners Niederkrome, E. Royce, B. Royce,² Jacob, and Schneider.

2. In holding and deciding that for the taxable year 1945 a portion of the incidental disbursements paid by Stages is taxable as a dividend to each of those petitioners.

3. In admitting into evidence respondent's Exhibit A, which includes a copy of the minutes of a meeting of the executive committee of American Business Credit Corporation, a Delaware corporation, held on June 20, 1945, certified by the treasurer and assistant secretary of the corporation. Respondent's Exhibit A is set forth in the Appendix, *infra*, pp. 5a-11a. The admission of this exhibit was objected to on the ground that it was incompetent hearsay. (R. 613-614.)

4. In holding and deciding that for the taxable year 1945 the sum of \$20,000 advanced by Hippodrome Amusement Company to the petitioner E. Royce is taxable to him as a dividend.

5. In holding and deciding that for the taxable years 1944 through 1947 the petitioner E. Royce is taxable with respect to the income of the partnership doing business as Yellow Cab Company in Portland, Oregon, which was distributable to his wife Dora F. Royce.

² One-half of the dividend income charged to B. Royce has been taxed to his wife Isabelle as her share of community income under the laws of Washington. (R. 129-130, 162, 220, 567.)

6. In holding and deciding that for the taxable years 1945 through 1947 the petitioner E. Royce is taxable with respect to the income of the partnership doing business as Yellow Cab Company in Seattle, Washington, which was distributable to his wife Dora F. Royce.

7. In holding and deciding that for the taxable years 1945 through 1947 the petitioner E. Royce is taxable with respect to the income of the partnership doing business as Yellow Cab Company in Seattle, Washington, which was distributable to the trust for the benefit of his daughter Eunice M. Royce.

8. In holding and deciding that for the taxable years 1948 and 1949 the petitioners E. Royce and Dora F. Royce are taxable with respect to the income of the partnership doing business as Yellow Cab Company in Seattle, Washington, which was distributable to the trust for the benefit of their daughter Eunice M. Royce.

9. In that its opinion and decisions are contrary to law and the respondent's regulations.

10. In that its opinion and decisions are not supported by but are contrary to the evidence and its findings of fact.

SUMMARY OF ARGUMENT

These cases present five basic questions for decision.

I.

Stages' distribution of the \$350,000 to Bentson in redemption of his 350 shares was a partial liquidation under section 115(c) of the 1939 Code. The Tax Court, however, has erroneously held that the distribution is taxable under section 115(g) as dividend income to the other stockholders—petitioners Niederkrome, E. Royce, B. Royce, Jacob, and Schneider. This conclusion was reached by wrongly attributing to them the 350 shares which Bentson owned and the \$350,000 which he had borrowed. As a result, the

five petitioners are being very heavily taxed on purely imaginary income.

There is no basis in the record for holding that any of the five petitioners realized income through the redemption of the 350 shares. Indeed, despite its conclusion the Tax Court substantially concedes that those shares belonged to Bentson. In so far as the evidence is concerned, the decision below rests on little more than multiple hearsay contained in respondent's Exhibit A, which refers to E. Royce. The Tax Court committed reversible error in admitting that exhibit into evidence. However, even if the 350 shares are mistakenly attributed to E. Royce on the basis of Exhibit A, the distribution is not taxable to him as a dividend under section 115(g). For if E. Royce is deemed to have owned the 350 shares, the redemption drastically reduced his proportionate interest in the corporation. Section 115(g) does not apply to a redemption which substantially impairs the stockholder's ownership and control.

Aside from its reliance on multiple hearsay, the Tax Court wrongfully regarded the Commissioner's determination as evidence to be balanced against the petitioners' proof. While the Commissioner's determination is initially presumed to be correct, the presumption of correctness promptly disappears when the taxpayer produces contrary evidence. But here the Tax Court erroneously treated the presumption as affirmative evidence to be weighed against the petitioners' proof. Since the court paid excessive deference to the presumption, its decision was improperly reached—quite aside from the other mistakes which contributed to its conclusion.

The Commissioner justified the alleged deficiencies on the ground that Bentson was imported into the various transactions pursuant to an overall plan for a quick redemption of the 350 shares. In the Commissioner's view, which the Tax Court sustained, the five petitioners desired to purchase only the corporate equity represented by 400

shares. The other 350 shares were merely temporarily held and expeditiously redeemed as a means of paying for the balance of the equity which they did not intend to acquire. Even if this untenable view of the evidence is accepted, section 115(g) does not apply. That section does not extend to a redemption of shares which are acquired, not as a permanent investment, but as a transitory expedient pending their quick retirement by the corporation.

The result is the same even apart from the plan alleged by the Commissioner—again erroneously assuming that the 350 shares may be attributed to the petitioners. Section 115(g) is confined to distributions which consist of earnings over and above the investment of the stockholder whose shares are redeemed. Therefore, the section does not apply to a redemption of stock held by an intervening purchaser for value who merely receives the amount which he invested in the stock after the surplus was accumulated. The redemption, then, does not represent a distribution of earnings on an investment. It is only the return of the investment itself. This limiting principle controls here because \$350,000 was paid on the purchase of the 350 shares and the same sum was paid on their redemption. There is no dividend income to be taxed, since only the capital outlay was returned. Any attempt to tax a return of capital as a receipt of income raises a serious constitutional problem.

The Tax Court similarly erred in treating the incidental disbursements paid by Stages as dividend income to the five stockholders other than Bentson. In any event, if the disbursements are regarded as income to them, the same sums are, in turn, deductible by them. In either case no tax is due on the disbursements.

II.

The \$20,000 advanced by Hippodrome to E. Royce is not taxable to him as a dividend. He received the amount as a loan and not for permanent use in lieu of dividends.

All the evidence, written and oral, is uncontradicted. It plainly shows that the advance was approved as a loan and has always been regarded as a loan; that repayment is to be made as soon as the corporation needs the money that the corporation expects to be paid and that E. Royce intends to repay it. The contrary conclusion of the Tax Court is oblivious to the record.

III.

Dora was a member of the Portland partnership, and therefore her share of the profits is not taxable to E. Royce. In holding otherwise the Tax Court failed to follow the relevant principles of law.

The concept of partnership in the income tax law is the same as the concept of partnership in commercial law. In other words, a partnership is an organization for the production of income to which each partner contributes either services or capital. A contribution of capital includes an interest in the firm capital which has been acquired as a gift from another partner. In determining whether a partnership has been formed, the Tax Court cannot appraise the value of the contributed services or capital in the light of some objective standard of its own. If the alleged partner has actually rendered services or actually acquired an interest in the capital, he qualifies as a member of the partnership.

Under these controlling standards of judgment Dora must be recognized as a partner. According to the evidential facts, which are essentially undisputed, Dora acquired a capital interest in the firm and she also rendered services to the firm. E. Royce did not retain any special powers or privileges which rendered her interest illusory. The firm continuously kept books which reflected her capital account, her share of the earnings, her periodic drawings, and the balance to her credit. Whenever distributions were made, she took her aliquot

portion. She spent and invested her income as she saw fit. At the same time, E. Royce continued to pay the ordinary expenses of the household. The Tax Court erred as a matter of law in taxing Dora's share of the firm earnings to E. Royce.

IV.

Dora was also a member of the Seattle partnership, and the Tax Court erred in attributing her share of the firm profits to E. Royce.

Neither Dora nor E. Royce actively participated in the Seattle enterprise. Both were essentially passive investors in a business whose income derived from capital plus the efforts of others. She owned her capital interest as fully as he owned his, and the firm income was no more attributable to him than to her. In such circumstances it is settled that the donee-partner's distributive share of firm earnings is not taxable to the donor-partner.

V.

The trust for Eunice M. Royce was also a member of the Seattle partnership, and the Tax Court equally erred in taxing its distributive share of the income to E. Royce. The trust owned its capital interest in the partnership just as completely as E. Royce owned his. The income of the partnership was not attributable to the personal services of E. Royce, for he was simply an inactive investor in the enterprise. There is no more reason to disregard the trust's interest than his interest. The status of the trust as a partner is not impaired by the powers of administration reserved by E. Royce as trustee. Since he held these powers as trustee, they were fiduciary powers; and fiduciary powers do not disqualify a trust from becoming a partner. Nor may the trust be ignored as a partner because of the loans made to E. Royce. Whether or not the loans constituted sound trust management is at most a question of local trust law. It does not affect the interest of the trust as a partner in the business.

ARGUMENT

I.

**THE DISTRIBUTION IN REDEMPTION OF BENTSON'S STOCK
AND THE INCIDENTAL DISBURSEMENTS ARE NOT
TAXABLE AS DIVIDEND INCOME TO THE OTHER STOCK-
HOLDERS**

The basic issue here is easily stated. Six individuals—Niederkrone, E. Royce, B. Royce, Jacob, Schneider, and Bentson—acquired all the outstanding stock of a corporation. In September, 1945, the corporation paid \$350,000 to Bentson in redemption of his 350 shares. The question is whether the Commissioner may attribute the ownership of the 350 shares to the other stockholders, and then tax the \$350,000 to them as dividend income. In other words, may the Government impose heavy income taxes on the basis of stock which was never owned and income which was never received?

Our analysis begins with the Internal Revenue Code of 1939, for any tax “asserted by the Commissioner” must be “authorized by Congress.” *Helvering v. Griffiths*, 318 U. S. 371, 394 (1943). Section 115(c) of the 1939 Code declares that “amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock.” Section 115(i) defines “amounts distributed in partial liquidation” as including “a distribution by a corporation in complete cancellation or redemption of a part of its stock.” Finally, section 115(g) states that if a corporation cancels or redeems its stock “at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend,” the distributed amount “shall be treated as a taxable dividend” to the extent that it represents a distribution of accumulated earnings or profits. In short, the quoted statutes provide a general rule and a special exception. Under the general rule the proceeds of a redemption of stock are treated as the proceeds of

a sale, and any gain is taxable as a capital gain. Under the special exception the proceeds of redemption are taxed as ordinary income if the distribution is “essentially equivalent” to a dividend.

It is equally settled that a distribution may be in “partial liquidation” though the corporation is not in the process of contraction or dissolution. As the Tax Court has succinctly stated, section 115 (c) and (i) “applies, not to a distribution in liquidation of the corporation or its *business*, but to a distribution in cancellation or redemption of a part of its *stock*.” *Hamilton Allport*, 4 T. C. 401, 403 (1944). (Italics in original.) And a “partial liquidation” occurs “whenever a corporation distributes money or assets in complete cancellation or redemption of a part of its capital stock. No particular portion is mentioned, nor is the word ‘part’ in any way limited.” *Salt Lake Hardware Co.*, 27 B.T.A. 482, 486 (1932). “In order for a distribution to be a distribution in partial liquidation it is not necessary that the corporation be planning a cessation or winding up of a part of its business activities.” *L. B. Coley*, 45 B.T.A. 405, 416 (1941). See also *Benjamin R. Britt*, 40 B.T.A. 790, 796-797 (1939), *aff’d on other issues*, 114 F.2d 10 (4th Cir. 1940). The regulations are to the same effect. They expressly recognize a “partial liquidation” through a “complete retirement of any part of the stock, whether or not pro rata among the shareholders.” Regulations 111, § 29.115-5. It is immaterial that the corporation continues to function as before. Indeed, the statute and regulations assume that the corporation will remain alive and active, for they both direct that the distribution be appropriately allocated between its capital account and earned surplus in order to determine the tax on later distributions. See Int. Rev. Code of 1939, § 115(c); Regulations 111, § 29.115-5.

In view of the rules just summarized the redemption of the 350 shares readily qualified as a “partial liquidation”

within section 115(c). The distribution of the \$350,000 was "in complete cancellation" of all those shares. And, in accordance with section 115(c) and the related regulations, \$35,000 was charged to capital and \$315,000 to surplus. Section 115(g) cannot apply because the redemption completely terminated Bentson's interest in Stages. In the words of the Treasury, "a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend." Regulations 111, § 29.115-9. Accord: *Zenz v. Quinlivan*, 213 F. 2d 914 (6th Cir. 1954); *Summerfield v. United States*, 145 F. Supp. 104 (E.D. Mich. 1956), *aff'd*, 249 F. 2d 446 (6th Cir. 1957); *Clara Louise Flinn*, 37 B.T.A. 1085 (1938); *Carter Tiffany*, 16 T. C. 1443 (1951), *petition dismissed*, 2d Cir., March 7, 1952; *Auto Finance Co.*, 24 T. C. 416 (1955), *aff'd*, 229 F. 2d 318 (4th Cir. 1956); *Giles E. Bullock*, 26 T. C. 276 (1956); *Jackson Howell*, 26 T. C. 846 (1956); *Estate of Ira F. Searle*, 9 T.C.M. 957 (1950); and see *In re Lukens' Estate*, 246 F. 2d 403, 406 (3d Cir. 1957). Cf. Rev. Rul. 56-556, 1956-2 Cum. Bull. 177; Rev. Rul. 57-387, I.R.B. 1957-35, 12.

Despite the pertinent rules of law the Commissioner asserts that the \$350,000 is taxable as dividend income under section 115(g). He has avoided the relevant rules by simply refusing to regard Bentson as a stockholder of Stages. The Commissioner contends that petitioners Niederkrome, E. Royce, B. Royce, Jacob, and Schneider "purchased the Stages stock with the funds which they in substance borrowed from ABC, which funds were later repaid with those obtained from Stages; that the indebtedness was incurred by and for the petitioners; and that its payment by the corporation constituted a dividend to them." In the light of this analysis the Commissioner would "ignore the presence of Bentson in the transactions as being no more than a straw man." (R. 237.) And so,

in order to sustain his deficiencies, the Commissioner has zealously enveloped the other five stockholders in a conspiratorial atmosphere of sham and deception. According to the Commissioner, the five stockholders disingenuously planned a quick redemption of the 350 shares after their acquisition, and Bentson was calculatedly imported into the transactions as a means of disguising a taxable dividend within section 115(g).

We cannot do better than quote the precise words of the Commissioner's accusation as they appear in his notices of deficiency. The five petitioners, the Commissioner says, "negotiated for the capital stock of" Stages. "As a result of the negotiations" they purchased 400 shares. "In accordance with the plan adopted, the remaining 350 shares of" Stages "were acquired in the name of" Bentson "in consideration of payment of \$350,000.00 in cash. Such payment was made from the proceeds of a loan obtained by" E. Royce, "acting for" himself and his four "associates," through ABC-Portland, "on a 90-day note which was signed by" E. Royce and Bentson, "and which was collateralized by deposit of the entire 750 shares of stock" of Stages. "On or about September 6, 1945, pursuant to the plan adopted by" the five "associates," Stages "acquired the 350 shares of its own stock then standing in the name of" Bentson "and issued its check to him in the sum of \$350,000.00. This check was immediately endorsed and delivered to" ABC-Portland "in satisfaction of the 90-day note signed by" E. Royce and Bentson. "It has been determined that it was not intended that" Bentson "should acquire, nor did he at any time acquire, any bona fide or actual beneficial interest in the stock of" Stages. (R. 25-26, 88-89, 128-129, 188-189, 201-202.)

While the Commissioner is firmly persuaded that the redemption derived from a prearranged "plan," he is considerably less assured in finding someone to tax on the alleged dividend income. The doubts which have dis-

turbed the Commissioner are fully revealed in his notices of deficiency. For in these notices he has made diverse determinations that are clearly in conflict. On the one hand, he has ruled that Niederkrome, B. Royce, Jacob, and Schneider are each taxable on a portion of the \$350,000. The portion taxed to each of the four is determined by the ratio of his number of shares "to the total of 400 shares." (R. 26, 129, 189, 202.) On the other hand, the Commissioner has also ruled that E. Royce is taxable on the entire \$350,000. (R. 89.) Though the determinations are irreconcilable, they have one thing in common. Each proceeds on the assumption that Bentson was a pawn in a devious scheme looking toward a quick redemption—that he neither owned the shares that were redeemed nor borrowed the money that was repaid.

The Tax Court has resolved the Commissioner's difficulties by holding that the \$350,000 paid to Bentson is taxable as dividend income to all five petitioners on a pro rata basis. We respectfully submit that the Tax Court's decision is clearly wrong. The alleged artful plot derives entirely from the Commissioner's own resourceful imagination. The voluminous record does not disclose what he has diligently discovered. In treating Bentson as a mere pawn in a "plan," the Tax Court has plainly failed to abide by the evidence and the governing principles of law. Indeed, its decision rests on little more than one item of multiple hearsay, plus an erroneous assumption that the Commissioner's initial determination qualifies as evidence.

For convenience of analysis we shall first examine the relevant evidence in regard to Niederkrome, B. Royce, Jacob, and Schneider. We shall then appraise the relevant evidence with respect to E. Royce.

A. Niederkrome, B. Royce, Jacob, and Schneider Did Not Realize Any Income Through the Redemption

There is not the slightest proof in the lengthy record that Niederkrome, B. Royce, Jacob, or Schneider owned any of the 350 shares redeemed from Bentson or borrowed any of the \$350,000 loaned by ABC-Portland. On the contrary, the Government's own evidence reveals that it has freely indulged in conjecture and speculation on behalf of the result which it seeks.

Niederkrome, B. Royce, Jacob, and Schneider each took the stand, and the testimony of all four was specific and to the point. Niederkrome declared that he owned only 55 shares (R. 348, 351-352); that he had no interest in the 350 shares acquired by Bentson (R. 350-351); and that he did not participate in the negotiations for the loan from ABC-Portland. (R. 357.) B. Royce similarly stated that he had no interest in the 350 shares (R. 563-564); and that he was wholly removed from the negotiations for the loan. (R. 567.)

Jacob has been an attorney for about 30 years. (R. 315.) He testified that he acquired 100 shares (R. 316, 335); that Bentson was one of the purchasing group (R. 315); that the 350 shares belonged to Bentson (R. 316-318, 330-331, 333-334); that the other five purchasers "expected and wanted to buy only" 400 shares (R. 316, 345); and that there was no design or understanding to retire the 350 shares "shortly." (R. 342.) Jacob further stated that Bentson was "very definitely" informed of Stages' earnings record before acquiring the 350 shares. (R. 328.) Bentson "camped on Mr. Schneider's trail here for several days, in connection with the operation before he went into it." Bentson "was with Mr. Schneider for quite some time before he decided finally to go into it." (R. 328.) Bentson was "active" in the transaction "right down to the day of the transfer of the stock" (R. 338); he "sat up and took part in all the negotiations" (R. 339); and he

attended the closing. (R. 322.) He "made a very good appearance" and was "very impressive looking" (R. 317, 339); he was "very intelligent and alert" (R. 317, 339); and at one meeting "he made the most impressive presentation of anybody there." (R. 339.) In regard to the loan from ABC-Portland, Jacob testified that he merely introduced Bentson and E. Royce to Davidson. (R. 318, 336, 338, 343.) Jacob had previously met Davidson in seeking "some financing" from ABC-Portland "for some other clients." (R. 318.) After the introduction all negotiations leading to the loan were handled by Bentson and E. Royce. (R. 318-319.) Jacob had nothing to do with the negotiations (R. 318-319, 336, 341-343), nor was he present when the note for \$350,000 was signed. (R. 325, 327.)

Schneider confirmed the evidence given by the others. He emphasized that Bentson owned the 350 shares. (R. 369, 372-374.) He explained that before the purchase was consummated, he and Bentson inspected the bus routes "over a period of two and a half days." (R. 364.) And he meticulously summarized their tour of inspection, which included "every depot." (R. 364-365.) Bentson "was very much interested in the facilities of the Oregon Motor Stages;" "very much interested in the Camp Adair installation, and he went through the shop of the Oregon Motor Stages, at that time, we had a shop in Astoria, we had one in Forest Grove, and we had a shop in Corvallis, and we had a shop in Salem, and he also checked the facilities of the operation in Portland." (R. 365.) Apart from all this checking, Bentson spent several hours with the comptroller of the company and went over its financial statements. (R. 365-366.) Bentson was present throughout the closing and took "the same part as anybody else did." (R. 367, 373.)

Despite all this plain-spoken testimony the Tax Court sustained the Commissioner. We now turn to the reasons given by the court in failing to heed the evidence.

The Tax Court first notes the absence of any proof that in July, 1945, Bentson "had a net worth ample to undertake the purchase of stock" for \$350,000, or that he was then "a man of wealth." (R. 239.)³ The Tax Court then observes that the purchase of the 350 shares was not recorded in the rather crude books which Bentson kept. (R. 240.) We fail to see how these matters remotely indicate that Niederkrome, B. Royce, Jacob, and Schneider owned any of the 350 shares or owed any of the \$350,000. Investors commonly embark on financial ventures with borrowed funds. What Bentson did is customarily done every day in our economy of private enterprise. The entrepreneur who uses borrowed capital is a familiar figure in the world of business. And in "a free economy, courts are not permitted to make contracts for the parties, but merely to pass upon the legality of such contracts when made." *Nelson v. Commissioner*, 203 F. 2d 1, 7 (6th Cir. 1953). Surely it is odd reasoning that regards a routine mode of investment as a cause for suspicion, and then treats undue suspicion as an adequate excuse for attributing the acquired property to persons other than the investor. No one disputes that Bentson lacked sufficient funds of his own to purchase the 350 shares.⁴ Otherwise he would not have resorted to the loan.⁵ The question, rather, is whether his need for financial assistance is any proof that it was others who made the loan and bought the shares. Nor does the Tax Court reach firmer ground when it refers briefly to Bentson's homespun rec-

³ At this point the Tax Court gratuitously adds a sinister touch with the comment that Bentson refused "to render a net worth statement to an agent of respondent when called upon to do so during the course of his investigation." (R. 239-240.) The agent merely indicated that Bentson did not itemize his various assets when informally asked to do so. (R. 608.) In the Tax Court even the Commissioner regarded this trivial detail as too irrelevant to mention in his brief.

⁴ See p. 5, *supra*.

⁵ The Tax Court concedes that Bentson's funds "were blocked in Canada." (R. 239.) See also R. 319, 340, 373, 378, 391, 407.

ords found after his death. In the first place, the court freely assumes, without any supporting evidence, that Bentson methodically entered each and every financial transaction as it occurred.⁶ Second, and more important, Bentson's books or lack of books can scarcely be dignified as evidence with respect to Niederkrome, B. Royce, Jacob, and Schneider.

The Tax Court next concedes that there is evidence "that Bentson applied for and was granted a loan of \$350,000 by ABC to provide him with cash to make the purchase." (R. 240.) However, the court then promptly adds that "other evidence, which we regard as much more reliable, is to the contrary. Respondent's view is that E. Royce, acting on behalf of petitioners, applied for and negotiated the loan." (R. 240.) The opinion proceeds to indicate that the so-called "other" and "much more reliable" evidence consists of minutes of a meeting allegedly held by the executive committee of American Business Credit Corporation, hereinafter referred to as ABC-Delaware, which was the parent company of ABC-Portland. (R. 240.) "Bentson," the Tax Court says, "was not mentioned in the corporate record of ABC and nothing in the minutes of the meeting indicates that Bentson ever applied for the loan or had anything to do with it. Clearly, the loan was made to E. Royce." (R. 240.) Having made these observations the court nevertheless feels compelled to admit that Bentson signed the note as a maker. But having made this admission, the court immediately tries to bypass it as follows: "Bentson's signature on the note was not required by the executive committee in granting the loan and no proof was made of subsequent action

⁶ The Tax Court states that Bentson "was careful to record many small transactions in books personally kept by him." (R. 240.) Here the court is merely engaging in guesswork. The record contains no proof as to how "careful" Bentson was. The Commissioner's own witness conceded that "there could have been other records, and there could have been assets not reflected there." (R. 608-609.) Bentson may very well have had separate records for his 350 shares.

to include him as a borrower. Thus, absent proof of any requirement by the lender that Bentson sign the note as a co-maker, he would appear to have been a mere volunteer." (R. 240-241.)

Once more the Tax Court's appraisal is less than responsive to the evidence. In fact, the supposed proof cited by the court confirms what the evidence otherwise discloses—that Niederkrome, B. Royce, Jacob, and Schneider did not seek or receive any loan from ABC-Portland. The Tax Court's effort to rationalize differently rests entirely on certain minutes of ABC-Delaware. As we shall shortly show, these minutes are simply inadmissible hearsay which the Tax Court regards as significant evidence. See pp. 44-57, *infra*. However, even if this error is ignored, the conclusion remains the same. The minutes nowhere suggest or imply that Niederkrome, B. Royce, Jacob, or Schneider applied for a loan. At most the "other" and "much more reliable" evidence refers to a loan supposedly sought by E. Royce. Certainly mere evidence that E. Royce may have applied for a loan⁷ does not qualify as proof that he acted as agent for Niederkrome, B. Royce, Jacob, or Schneider. Moreover, the Tax Court is wholly oblivious to cogent documentary evidence when it declares that "Bentson was not mentioned in the corporate record of ABC" and "no proof was made of subsequent action to include him as a borrower." We are referring to the financial records of ABC-Portland which the Commissioner himself introduced and which the Tax Court nowhere mentions. (Ex. D, E, G.). These routine business records unmistakably disclose an indebtedness of \$350,000 owed by Bentson to ABC-Portland. See pp. 6-7, *supra*.

Three conclusions easily emerge here. First, the fact that Bentson is not mentioned in the minutes is no proof whatever that anyone applied for a loan on behalf of Nieder-

⁷ At this point we are, of course, erroneously assuming, as the Tax Court held, that the minutes of ABC-Delaware were admissible as evidence.

krome, B. Royce, Jacob, or Schneider. For that matter, neither is Niederkrome or Schneider mentioned in the minutes. Second, the minutes do not in any way indicate that Bentson or anyone else was serving as a compliant conduit for them. Third, the Commissioner's own documentary evidence reinforces the taxpayers' specific testimony that Bentson applied for and obtained a loan of \$350,000 from ABC-Portland.

The Tax Court's reasoning does not improve as it continues. The "evidence convinces us," says the court, "that Bentson did not become involved in the transaction until after application was made for the loan by Royce." (R. 241.) "According to the testimony," the court states, "Bentson became interested as a participant in the venture during a visit to Portland in June 1945 and, after an examination of Stages' financial condition and its assets located in various cities, agreed to buy the uncommitted 350 shares." (R. 241.) Having correctly summarized the testimony—which is nowhere contradicted—the Tax Court then brushes it aside because "proof is lacking" that Bentson "was in Portland before application was made to ABC for the loan." (R. 241.) "Without more evidence," the court states, "we cannot find" that Bentson initially met with Jacob and Schneider, at E. Royce's home, "earlier than the Sunday during the latter part of June 1945. The last Sunday in June fell on the 24th, which was 4 days after the loan application was considered by the executive committee of the parent company" of ABC-Portland. "Clearly, Bentson, on such facts, could not have signed the application for the loan." (R. 242.)

Here the Tax Court has too readily become entangled in a difficulty of its own making. There is ample, undisputed evidence that Bentson was in Portland before June 20, 1945. On direct examination attorney Jacob testified that he met with Bentson at E. Royce's home "during the middle or latter part of June, 1945." (R. 317.) On cross-examination Jacob stated that Bentson became

interested in the stock negotiations in "the latter part of June." Since ten years had elapsed, Jacob understandably could not remember the precise date, but he definitely recalled that he conferred with Bentson at E. Royce's house on "a Sunday evening," and that "it was some time in the latter part of June." (R. 338.) Jacob further stated that he introduced Bentson to Davidson "some time the latter part of June"—"between the 15th and the end of the month." (R. 338.) Schneider testified that he and Jacob met Bentson together at E. Royce's home (R. 363), and that Bentson inspected the bus routes and facilities "perhaps a couple of weeks before" the purchase was made. (R. 380-381.)

On a fair reading of the testimony Bentson was in Portland in the "middle or latter part" of June, 1945. In June, 1945, Sunday fell on the 3rd, 10th, 17th and 24th. The "middle" portion of June would, of course, embrace the 10th. However, even if we assume, in behalf of the Commissioner, that the meeting with Bentson was not until the "latter part" of June, 1945, it could still have easily occurred before June 20th. The "latter part" of a month, as normally understood, is the entire second half of the month. Hence here the second half of June necessarily included the Sunday which fell on the 17th, or three days before the asserted meeting of the executive committee of ABC-Delaware. To this we should add Jacob's positive testimony that he introduced Bentson to Davidson before the negotiations for the loan began. See p. 34, *supra*. Finally, the Tax Court itself found that Bentson "visited Portland and was consulted about the venture." (R. 222.)

As a further basis for disregarding the evidence, the Tax Court next reasons that "the circumstances are such as to create an inference" that E. Royce "obtained the loan for the benefit of all of the petitioners." (R. 242.) In support of this "inference" the court states that "petitioners did not wish to invest more than \$400,000 of their

own money in the stock. Borrowing became either necessary or desirable to acquire the remaining 350 shares, and to obtain a loan, a pledge of all of the stock as security for the loan was required. All of the interested parties agreed to loan their stock for that purpose and it was put up as collateral for payment of the note evidencing the loan concurrently with its acquisition from the sellers. E. Royce thus assumed, as co-maker, primary liability for payment of the note and the other stockholders were liable to the extent of the value of their pledged stock. All benefited by the loan for only with it, was all of the stock acquired." (R. 242.)

The Tax Court's analysis merely begs the question to be answered. Of course, Niederkrome, Jacob, Schneider, and the Royces "did not wish to invest more than \$400,000 of their own money in the stock." But it does not in the least follow that they, rather than Bentson, therefore purchased the other 350 shares. The answer turns on a balanced appraisal of the evidence, as distinguished from "inferences" which stubbornly ignore the evidence. And according to the evidence, Niederkrome, B. Royce, Jacob, and Schneider did not participate in the purchase of the 350 shares or the loan of the \$350,000. See pp. 33-34, *supra*. The Tax Court indulges in further question-begging when it dwells on the "benefit" derived from the loan. The alleged "benefit" simply presupposes once more that Bentson did not buy the 350 shares with borrowed funds, secured by his own shares as well as the shares loaned by the others. Nor does the Tax Court move much further when it remarks that the others pledged their stock as collateral for the loan from ABC-Portland. As Niederkrome, B. Royce, Jacob, and Schneider very clearly testified, they each pledged their individual shares because ABC-Portland required them to do so. Nothing in the record contradicts their firm assertion that their shares were put up as collateral for the loan of Bentson, and not for any loan of their own. See pp. 5-6, *supra*.

The Tax Court's decision in *Ray Edenfield*, 19 T.C. 13 (1952), leaves little more to be said. There the taxpayer and two others purchased part of the stock of a corporation. At the same time the sellers turned in the rest of their stock to the corporation for second mortgage notes payable in installments. The taxpayer and his associates pledged their stock as security for the corporate indebtedness. Later, when the corporation paid the notes, the Commissioner contended that a portion of the payments was dividend income to the taxpayer. The Tax Court quickly disposed of his argument. It pointed out that the corporation, and not the acquiring stockholders, was the debtor on the notes. "Under such state of facts it requires no citation of authorities to establish that payments on the debt did not result in dividends" to the taxpayer. He "did not at any time purchase or own the stock which was retired. The stock was never transferred to him and he never assumed any personal liability for the mortgage." While he and his associates pledged their own shares as additional security, "that was merely giving the corporation of which they were then the sole stockholders the benefit of the use of their collateral. The mortgage indebtedness was in no sense their indebtedness. It was the corporation's indebtedness." *Id.* at 20-21. The Commission has formally acquiesced in the *Edenfield* opinion as a correct analysis to be applied "in the disposition of other cases." See 1953-1 Cum. Bull. 2, 4. Cf. *Estate of Edward L. Koepenick*, 2 T.C.M. 143 (1943).

The *Edenfield* case and this case are practically the same. There a group of stockholders pledged their newly acquired shares as collateral for the indebtedness of their corporation. Here a group of stockholders pledged their newly acquired shares as collateral for the indebtedness of an associate. In both cases the payment of the loan derived from corporate funds, and the pledgors "did not at any time purchase or own the stock which was retired." In brief, those who loaned their shares as collateral here

no more "benefited" than those who did likewise in the *Edenfeld* case. And the resulting release of their stock from the pledge on behalf of Bentson did not bestow on them any gains or profits. They merely reacquired possession of the stock which they already owned. For analogous cases where the Commissioner tried in vain to construct dividend income out of corporate payments to others, see *Ruben v. Commissioner*, 97 F. 2d 926 (8th Cir. 1938); *Nelson v. Commissioner*, *supra*; *Tucker v. Commissioner*, 226 F. 2d 177 (8th Cir. 1955); *S. K. Ames, Inc.*, 46 B.T.A. 1020 (1942); *Lloyd H. Diehl*, 1 T.C. 139 (1942), *aff'd*, 142 F. 2d 449 (6th Cir. 1944).

As a last reason for rejecting the relevant testimony, the Tax Court states, "We search in vain for a justifiable corporate business reason for redeeming the stock. The redemption served to make available funds from surplus with which to pay the outstanding note and put petitioners in a position to repossess their stock free of any encumbrance." (R. 243.) After indicating that the redemption reduced the funds available for new equipment, the court declares, "In any event, we find no justification for concluding under the evidence that the redemption in question served a legitimate business purpose of Stages." (R. 244.)

Again the Tax Court seems strangely confused in response to the question before it. Since the redemption of the 350 shares completely terminated Bentson's interest in the corporation, the distribution of the \$350,000 cannot be taxed as a dividend under section 115(g). See p. 30, *supra*. The presence or absence of business purpose is wholly irrelevant where all the shares of a particular stockholder are redeemed. See *In re Lukens' Estate*, *supra*, at 406; and *Zenz v. Quinlivan*, *supra*, where the redemption was solely designed to serve an individual tax advantage and absorbed substantially the entire earned surplus. As the Second Circuit recently emphasized in regard to business purpose, "We find nothing in the text

of the statute, its legislative history, or the applicable Treasury Regulations that makes this consideration relevant." *Northup v. United States*, 240 F. 2d 304, 307 (2d Cir. 1957).

Finally, despite all its labored analysis the Tax Court substantially agrees that the 350 shares belonged to Bentson. The court refers to "petitioners and Bentson's acquisition of Stages stock." (R. 234.) It finds that "Bentson was one of the stockholders present at the meeting" which considered the redemption of the 350 shares. (R. 229.) And later it significantly states, "The retirement of about 47 percent of the outstanding stock gave petitioners, collectively, complete ownership of Stages and increased their proportional interests in the remaining assets and future earnings without any additional investment on their part." (R. 243.) This observation is intelligible only if Bentson previously owned the 350 shares. If, as the Commissioner asserts, Bentson was merely the straw of his associates and they already owned all the shares of Stages, then obviously the redemption could not have given them "complete ownership of Stages and increased their proportional interests" in the assets and earnings. Hence in the end the Tax Court, too, regards Bentson as the owner of the 350 shares. And since he owned those shares, the amount paid to him on their redemption cannot be taxed to others as a dividend under section 115(g). See pp. 29-30, *supra*.

B. E. Royce Did Not Realize Any Income Through the Redemption

We have argued that the record is devoid of any evidence which justifies the deficiencies asserted against Niederkrome, B. Royce, Jacob, and Schneider. On the contrary, the evidence affirmatively reveals that the deficiencies were conceived in error. We now examine the evidence as it relates to E. Royce.

E. Royce testified at length concerning the 350 shares. He stated that he had no interest in them and that they

belonged to Bentson. (R. 393, 397-398.) Before Bentson acquired them, he "investigated this pretty thoroughly, and he thought it was a good business deal." (R. 391.) As regards the loan, E. Royce explained that Jacob introduced him and Bentson to Davidson; that "until I met Mr. Davidson through Mr. Jacob," ABC-Portland "was brand new to me;" and that Bentson then applied for a loan from ABC-Portland. (R. 391, 393, 404.) Bentson was "the active negotiator for the loan," "dealt with" Davidson, and "made the arrangements for the loan." (R. 403-404.) In granting the loan ABC-Portland required E. Royce to sign the note as accommodation maker because Bentson was a Canadian citizen. (R. 391-392, 404.) ABC-Portland distinctly understood that E. Royce was a party to the note on an accommodation basis. (R. 391-392, 396-397, 404-405.) At no time did he represent that he was making a loan on his own behalf. (R. 403-404.) And he never "at any time, in any way," indicated to ABC-Portland that the loan was for his "benefit." (R. 396.) Moreover, there was no understanding that the 350 shares would be redeemed later. (R. 406.) So far as E. Royce was aware, Bentson had intended to hold on to his stock. (R. 408-409.) E. Royce did not see the check that Stages issued on the redemption of the 350 shares. (R. 395-396, 412.)

The Tax Court turned its back on E. Royce's testimony, just as it chose to disregard the testimony of Niederkrome, B. Royce, Jacob, and Schneider. We have already examined the Tax Court's efforts to justify its departure from the ample evidence before it. See pp. 34-43 *supra*. At this point only one other item remains to be considered. This item is the Commissioner's Exhibit A, which was referred to in the Stipulation of Facts. (R. 209-210.) The petitioners expressly reserved the right to object to Exhibit A when offered as evidence. (R. 213-214.)

1. The Tax Court Erred in Admitting Exhibit A

Exhibit A consists of an affidavit by one Stuart A. Wixson and three attached typewritten pages. The affidavit is dated April 21, 1955. It states that Wixson is treasurer and assistant secretary of Crown Finance Company, Inc., formerly ABC-Delaware; that the three attached pages are a copy of the minutes of a meeting held on June 20, 1945, by the executive committee of ABC-Delaware; that "as appears" from the minutes, ABC-Delaware "approved the loan" of \$350,000 "by its Oregon subsidiary;" that "under the method of operation" between the two companies, the parent "would advance" to the subsidiary funds required "for the transaction of its business;" that the subsidiary "was dissolved" on or about June 27, 1949; and that "certain of its records were transferred" to the parent and were in the affiant's "general custody."

The three attached pages purportedly record a meeting of the executive committee of ABC-Delaware on June 20, 1945. The persons listed as present are "Messrs. Burman, Cashmore and Kincaid of the Committee; and by invitation, Messrs. Dick and Ebe, Vice Presidents of the Corporation, and Mr. Davidson, Vice President of the Corporation's Portland, Oregon subsidiary." Kincaid "served as Chairman" and a Mr. Fitzgerald "acted as Secretary." The minutes indicate that the committee considered four separate financial matters, including a requested loan of \$350,000. In the latter connection Davidson and Ebe "submitted an application on behalf of ABC-Portland. A group of outstanding individuals in Portland, headed by Messrs. Barney & Roy Royce and Robert Jacob, desire to purchase the entire capital stock of Oregon Motor Stages, largest intra-state bus company operating in Oregon." Of the total shares outstanding, the "purchasers intend to buy 400 shares for \$400,000, with their own funds. They ask that we extend a line of credit of \$350,000, the balance of the purchase price of the

Oregon Motor Stages stock. We are asked to lend Mr. Roy Royce, personally, the sum of \$350,000, on his note, to be secured by all of the capital stock of Oregon Motor Stages. Our loan to be repaid in 90 days or adjusted as conditions warrant. Mr. R. Royce's personal statement reflects a net worth of \$1,366,000.00. Retiring stockholders will guarantee to R. Royce and his associates that the worth of Oregon Motor Stages is not less than the figure shown on the company's 4/30/45 statement. A fee of \$5,000 plus 5% per annum on cash for every 90 days is charge contemplated." The minutes then go on to say that the executive committee "reviewed in detail the financial condition" of Stages; that "Mr. Davidson was questioned in respect to the proposed transaction;" and that "Mr. Dick's opinion was received. After consideration and full review, the Committee unanimously approved the credit line requested, subject to approval of counsel" and "unanimous approval of full Portland Committee." The minutes are purportedly signed by Fitzgerald, as Acting Secretary.

The petitioners objected to the admission of Exhibit A on the ground that it was "purely hearsay." (R. 613-614.) The Tax Court overruled the objection. (R. 615.) We have already pointed out that Exhibit A proves nothing in regard to Niederkrome, B. Royce, Jacob, and Schneider. See pp. 36-38, *supra*. As we shall now indicate, Exhibit A also proves nothing as against E. Royce.

The Tax Court hears and decides cases within the rules of evidence which apply in the District of Columbia. Int. Rev. Code of 1954, § 7453; Int. Rev. Code of 1939, § 1111. See *Baldwin v. Commissioner*, 125 F. 2d 812, 814 (9th Cir. 1942); *Masters v. Commissioner*, 243 F. 2d 335, 338 (3d Cir. 1957). Hence the Commissioner, no less than taxpayers, is barred from resorting to mere hearsay as legal proof. *Parish's Estate v. Commissioner*, 187 F. 2d 390 (7th Cir. 1951). See also *Spiegel's Housefurnishing Co.*, 2 B.T.A. 158 (1925); *Walker Creamery*

Products Co., 2 B.T.A. 474 (1925); *The Daily News Publishing Co.*, 4 B.T.A. 31 (1926); *Harry Symons*, 11 B.T.A. 886 (1928). Obviously, the minutes in Exhibit A were bare hearsay with respect to E. Royce and the other petitioners. A corporation's books and records "are not competent evidence against third persons to prove contracts with them, in the absence of proof that they knew and assented thereto." *Oregon & C. R. Co. v. Grubissich*, 206 Fed. 577, 580 (9th Cir. 1913). See also *Harrison v. Remington Paper Co.*, 140 Fed. 385, 401-402 (8th Cir. 1905), *cert. denied*, 199 U. S. 607 (1905); *Branding Iron Club v. Riggs*, 207 F. 2d 720, 725 (10th Cir. 1953). The Commissioner made no attempt to offer any such proof of knowledge or assent. "There is no evidence" that any of the petitioners "was present at the meeting or knew of its action." *Branding Iron Club v. Riggs*, *supra*, at 725.

Of course, we are not unaware of various exceptions to the rule against hearsay. For present purposes, it seems, we need only consider the exception relating to business entries. Cf. *Bruce v. McClure*, 220 F. 2d 330, 335 (5th Cir. 1955). In the Tax Court, as in the District Court of the District of Columbia, business entries are admissible under the Federal Business Records Act. Act of June 25, 1948, 62 Stat. 945, 28 U.S.C. § 1732. This statute provides that "any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event," is "admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."⁸

⁸ The statute further provides: "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

At common law business entries were not admissible unless they were authenticated by the very persons who made them. See, e.g., *Nettles v. Tillson*, 87 F. 2d 770 (5th Cir. 1937). The Business Records Act was designed to remove this unduly restrictive limitation. See *Palmer v. Hoffman*, 318 U. S. 109, 112 (1943); *Schmeller v. United States*, 143 F. 2d 544, 550 (6th Cir. 1944); *Hartzog v. United States*, 217 F. 2d 706, 710 (4th Cir. 1954); *United States v. Indian Trailer Corp.*, 226 F. 2d 595, 600 (7th Cir. 1955). While the governing rule has been relaxed, records are still inadmissible unless their proponent has first laid a proper foundation for their reception. In the concise words of Judge Learned Hand, corporate books "are not competent against a stranger merely because they are the books of the company whose dealings they purport to record." Nor do they become competent because the other party admits that they are books of the corporation. That alone does not make them admissible. *United States v. Feinberg*, 140 F. 2d 592, 596 (2d Cir. 1944). See also *Masterson v. Pennsylvania R. Co.*, 182 F. 2d 793, 797 (3d Cir. 1950).⁹ As the statute itself patently requires, there must first be proof that the record was made in the regular course of the business, and that it was the regular course of the business to make the record at the time of the recorded transaction or within a reasonable time after the transaction. If no such evidence is given, the writing is rigorously excluded. *United States v. Feinberg, supra*; *Clainos v. United States*, 163 F. 2d 593 (D.C. Cir. 1947); *Bruce v. McClure, supra*; *Schering Corp. v. Marzall*, 101 F. Supp. 571 (D.D.C. 1951); *United States v. Skolnik*, 149 F. Supp. 703 (S.D.N.Y. 1957); see *United States v. Bartholomew*, 137 F. Supp. 700, 708 (W.D. Ark. 1956).

⁹ See further *Terminal Railroad Association*, 17 B.T.A. 1135, 1164 (1929), where the taxpayer stipulated the existence of certain entries but reserved the right to object to their admission. In any event, a stipulation with respect to certain records is not a concession that the records are correct. *Azevedo v. Commissioner*, 246 F. 2d 196, 198 (9th Cir. 1957).

Here the Commissioner refrained from any effort to provide a proper foundation. The only evidence which the Commissioner produced was the affidavit by Wixson; and the only information which Wixson supplied was a copy of certain minutes within his custody as of April 21, 1955—ten years after the stated meeting of the executive committee. Neither Wixson nor anyone else offered the least proof that the minutes were made in the regular course of ABC-Delaware's business, or that it was the regular course of the business to prepare such minutes within a reasonable interval after the recorded meeting. At most the Commissioner merely established that the stated minutes were found among the corporate papers. Apparently Wixson "knew nothing else" about the writing, "and no other witness testified as to its authenticity." Cf. *Bruce v. McClure, supra*, at 334. As the Court of Appeals for the District of Columbia has emphasized, this is precisely the kind of meager evidence which is no basis whatever for admitting business records. *Clainos v. United States, supra*, at 595. If Wixson had taken the stand and simply stated what appears in his affidavit, the three pages would clearly have been inadmissible. Cf. *Spiegel's Housefurnishing Co., supra*, at 159. The same three pages did not become any more admissible because Wixson made the same inadequate observation in an affidavit rather than in court.

We are only repeating the conclusion reached amid similar circumstances in *Schering Corp. v. Marzall, supra*.¹⁰ There, too, a litigant sought to introduce books without the necessary foundation. The books "were not identified by the person who made the entries, or by any person who saw these books contemporaneously with the

¹⁰ Under section 7453 of the 1954 Code the decisions in the District of Columbia are especially important on questions of evidence from the Tax Court. As this Court has stated, "we therefore look to decisions of the Courts of that District to resolve" such questions. *Baldwin v. Commissioner, supra*, at 814.

events" which they purported "to record." They were merely "identified by witnesses who said they first saw them" about ten years after the events described. "There was no proof" that the books "were contemporaneous records and were not made subsequently to the events" which they professed "to report." In view of this failure of proof the books were naturally excluded.¹¹ See further *Bruce v. McClure*, *supra*; *United States v. Indian Trailer Corp.*, *supra*, at 600, excluding a record prepared a month after the alleged event; and *United States v. Skolnik*, *supra*, at 706, excluding a record for lack of proof that it was prepared within a reasonable period.

Even if the lack of a foundation is overlooked, Exhibit A was still inadmissible hearsay. "The mere fact that the paper offered in evidence is taken from a business file and is otherwise proved in compliance with" section 1732 "does not establish its competency." *Schmeller v. United States*, *supra*, at 550. See also *Gordon v. Robinson*, 210 F. 2d 192, 196 (3d Cir. 1954). After the required foundation is laid, the offered writing must also satisfy a basic standard of trustworthiness which is implicit in the statute. *Medina v. Erickson*, 226 F. 2d 475, 482 (9th Cir. 1955), *cert. denied*, 351 U. S. 912 (1956); *Hartzog v. United States*, *supra*, at 710. The essence of this standard has been summarized in *Palmer v. Hoffman*, *supra*. The Business Records Act, the Supreme Court stated, relates to "entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." The "basis of the rule" is "the trustworthiness of records because they were routine reflections of the day to day operations of the business." Admissibility hinges on "the character of the records and their earmarks of reliability" as "acquired from their source and origin and the nature of their compila-

¹¹ The records were also held inadmissible because of the nature of the entries which they contained. See further p. 51, *infra*.

tion.” 318 U. S. at 113-114. As the Court of Appeals for the District of Columbia has expressed the same principle, the Act authorizes the admission of only those records “which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations.” *New York Life Insurance Co. v. Taylor*, 147 F. 2d 297, 303 (D.C. Cir. 1945). See also *Clainos v. United States*, *supra*, at 596; *Gordon v. Robinson*, *supra*, at 196.

The crux of trustworthiness, then, is that the records are “routine” or “automatic” reflections of business transactions. The records “are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents.” *Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F. 2d 934, 937 (2d Cir. 1927). Hence the Court of Appeals for the District of Columbia pointedly holds that section 1732 is “limited to routine, clerical entries made contemporaneously with the event by a person charged with the duty of maintaining the records.” *Schering Corp. v. Marzall*, *supra*, at 573-574. The statute is not an excuse for the free and easy introduction of hearsay reports of conversations in the course of business. To admit such reports “is to give any large organization the right to use self-serving statements without the important test of cross-examination. Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor.” But the situation is quite different “where the accuracy of the entries depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant.” And such entries are not within section 1732. *New York Life Ins. Co. v. Taylor*, *supra*, at 301, 304, 306.¹²

¹² See note 10, *supra*.

The contents of Exhibit A fall far short of the controlling principle of trustworthiness. To begin with, they are not the kind of "automatic" reflections which assure reliability. On the contrary, they are a highly condensed summary of conversations and discussions where the narrator has selected "the particular entries from a larger mass of data which some other observer might consider equally relevant." See p. 51, *supra*. Indeed, the Commissioner, no less than we, is completely in the dark concerning the preparation of this abbreviated version of what was supposedly said. The minutes themselves are undated. No evidence indicates when they were prepared. Cf. *Bruce v. McClure, supra*, at 334. As is often true of corporate minutes, they may well have been put together many days after the stated meeting amid fading recollections. Cf. *United States v. Indian Trailer Corp., supra*; *United States v. Skolnik, supra*. Nor is there any evidence which even shows who prepared the minutes and how he prepared them. While they are signed by Fitzgerald as Acting Secretary, it does not follow that he wrote them. Moreover, no evidence reveals whether the unidentified scrivener was personally present at the meeting, and, if he actually attended, whether the minutes came from scratch notes rapidly taken or mental notes precariously carried away. See *United States v. Bartholomew, supra*, at 708-709. And, of course, there is not the slightest evidence that Davidson ever saw the minutes or approved them.

All these missing links emphasize what seems clear—that Exhibit A does not have any of the required "earmarks of reliability." It is no more than an abstract prepared by someone who proceeded to pick and choose his recorded material from a much larger mass of oral discussion and comment. To make matters worse, inaccuracies and omissions were hardly unlikely, for the minutes purported to summarize discussions of four diverse financial matters, each with its own peculiar problems and ramifica-

tions. Here, then, the Tax Court did not admit a group of entries which derived from some routine clerical system allowing very little margin for error. It received, rather, a short extract of various conversations which was inherently loose and omissive. See p. 51, *supra*. In the very relevant words of the Court of Appeals for the District of Columbia, "The accuracy of such accounts is affected by bias, judgment, and memory; they are not the routine product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for 'payrolls, accounts receivable, accounts payable, bills of lading and the like'." *New York Life Insurance Co. v. Taylor*, *supra*, at 300.

The minutes are inherently unreliable for still another reason. As we have noted, they purport to relate what Davidson said at a meeting of the executive committee of ABC-Delaware. His observations were designed to persuade the committee to advance \$350,000 to the subsidiary ABC-Portland. As a result, Davidson would be generously inclined to present the proposed loan of \$350,000 in the most favorable light for his purposes. He would naturally stress the reputation and prestige of E. Royce, who was a prominent businessman in Portland as well as a member of the purchasing group. Even if we assume that the minutes are accurate despite their obvious selectivity, at best they summarize the remarks of someone who would be prone to color and exaggerate. We do not intend to impugn the honesty or integrity of Davidson. We are only allowing for the customary patterns of human behaviour which are daily pursued in the utmost good faith. And so for this reason, too, the paper produced by the Commissioner failed to "bear the seal of trustworthiness." Cf. *Medina v. Erickson*, *supra*, at 482.

We have not yet exhausted the error of admitting Exhibit A. As the Third Circuit held in *Nicola v. United*

States, 72 F. 2d 780 (3d Cir. 1934), a writing does not qualify as competent evidence simply because it deals with matters of business. It is admissible only if it records a transaction which has already been consummated—not one which is still contemplated. The *Nicola* case aptly illustrates this principle. There the Government introduced a writing which instructed the bookkeeper to allocate profits to certain taxable entities. The Third Circuit held that the writing was erroneously admitted. “Books of account,” the Court stated, “consist of entries made in the regular course of business showing the transactions which have actually occurred in the business and not of orders, executory contracts, things to be done subsequent to the entries, or of methods and principles according to which the business must be conducted and entries made.” Book entries relating to sales are not competent evidence, the Court continued, “if the goods are charged before the contracts of sale are complete.” In order to be admissible an entry “must be the registry of a sale and delivery or a transaction actually made of the things therein contained, at the time of their being so entered.” 72 F. 2d at 783. Cf. *Terminal Railroad Association*, 17 B.T.A. 1135, 1165 (1929).

The *Nicola* opinion equally applies here. The question to be resolved is whether ABC-Portland loaned \$350,000 to Bentson, as five witnesses testified, or whether it loaned \$350,000 to any of the other five stockholders, as the Commissioner contends. On this question Exhibit A has nothing to say. For the minutes in the exhibit do not purport to record any loan which “actually occurred in the business” of ABC-Portland or was “actually made” by that corporation. At most they supposedly summarize, in very brief fashion, a discussion of “things” which may “be done” by ABC-Portland “subsequent to the entries.” We may state the same conclusion somewhat differently. In the language of section 1732, the “act, transaction, occurrence, or event” involved here is the precise loan made by ABC-Portland. But the only “act, transaction, occurrence, or

event," if any, recorded in the minutes is the contingent approval of an advance to be made by ABC-Delaware to ABC-Portland for a stated purpose, as distinguished from any loan actually made by ABC-Portland in the course of its business. To the extent that the minutes go further, they are only a hearsay report of conversations kept by a stranger to the loan made by ABC-Portland. The question is not what Davidson may have said, but what ABC-Portland actually did. And Exhibit A does not record any transactions between ABC-Portland and any of the petitioners. In contrast, the answer is plainly disclosed by the routine entries of ABC-Portland (Ex. D, E, G), as cogently supplemented by the uncontradicted testimony of E. Royce and the other petitioners. When all this oral and written evidence is put together, it was Bentson who owned the shares that were redeemed and it was Bentson who borrowed the money that was repaid.

The crux of the matter is that the Tax Court has rejected the sworn testimony of five witnesses in favor of one item of inadmissible hearsay. Income taxes, however, are real and onerous burdens. They are not to be complacently imposed on the basis of convenient conjecture and facile speculation, which are then feebly justified by rank hearsay. In the present context we cannot too strongly stress what the Supreme Court said many years ago. "The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security of truth." *Chaffee v. United States*, 18 Wall. 516, 541 (1873). And, as the Court has more recently warned, the Business Records Act does not contain any "major change which opens wide the door to avoidance of cross-examination." *Palmer v. Hoffman*, *supra*, at 114. These admonitions are peculiarly applicable here. The Government is taxing \$350,000 as income under cover of alleged evidence which is not only inadmissible, but wholly impervious to the

right of cross-examination—that right “which has always been regarded as the greatest safeguard of American trial procedure.” *New York Life Ins. Co. v. Taylor, supra*, at 305.

Here the Government’s resort to hearsay has been especially effective in “avoidance of cross-examination.” According to Exhibit A, at least seven persons attended the meeting of June 20th. These seven were Dick and Ebe, vice-presidents of ABC-Delaware; Burman, Cashmore and Kincaid, members of the executive committee; Davidson, vice-president of ABC-Portland; and Fitzgerald, acting secretary. Davidson died before the trial. (R. 212.) But so far as the record shows, the other six were fully available for testimony under oath. Yet the Government failed to call them. Nor can it be argued that they were too inadequately informed to testify. Exhibit A states that Ebe, together with Davidson, “submitted” the application considered; that the executives “reviewed in detail” the financial condition of Stages; that Dick’s “opinion was received;” and that the committee “approved” after “consideration and review.” Again, Exhibit A states that the executive committee’s action was “Subject to unanimous approval of full Portland Committee.” Nevertheless no member of the Portland Committee was placed on the stand. Once more the Government evinced little interest in oral testimony by those who were presumably informed. In short, no witness who had any direct knowledge relating to the loan was produced. Cf. *Lomax Transportation Co. v. United States*, 183 F. 2d 331, 334 (9th Cir. 1950); *Nettles v. Tillson, supra*, at 773. Instead, the Government was content to rest a very large deficiency on mere multiple hearsay.¹³ Wixson referred to what Fitzpatrick supposedly said ten years earlier. And Fitzpatrick allegedly said what Davidson allegedly said that E. Royce had allegedly

¹³ Schneider testified that Bentson conferred for several hours with the comptroller of Stages. See p. 34, *supra*. Yet the Government apparently made no effort to have the comptroller testify.

said. This kind of "evidence" is then dignified as competent and persuasive proof that E. Royce, rather than Bentson, acquired the 350 shares of Stages stock and borrowed the \$350,000 required to purchase those shares. Cf. *Parish's Estate v. Commissioner, supra*, at 395, which notes "the novel contention" that hearsay should be accepted as proof.

If ABC-Portland relied on this sort of hearsay in a suit to recover the \$350,000 from E. Royce, its cause of action would not get very far. The same evidence does not miraculously improve because the Government resorts to it as proof that E. Royce realized income of \$350,000 or some lesser sum.

The opinion of the Tax Court clearly reveals that its conclusion hinges on the so-called "reliable" evidence in Exhibit A. Since a judgment of deficiency based on inadmissible evidence cannot stand, the conclusion should be reversed. See *Baldwin v. Commissioner, supra*; *Parish's Estate v. Commissioner, supra*. Cf. *Hartzog v. United States, supra*; *Smallfield v. Home Ins. Co.*, 244 F. 2d 337 (9th Cir. 1957).

2. E. Royce Did Not Derive Any Income Even If the Stock and the Loan Are Attributed to Him

We have contended that E. Royce cannot be treated as the owner of the 350 shares held by Bentson or the borrower of the \$350,000 paid for the shares. However, even if the shares and the loan are nevertheless imputed to him, the \$350,000 cannot be taxed to him as a dividend within section 115(g).

A dividend, as commonly understood, is a corporate distribution of surplus which leaves the stockholder's equity and control substantially unimpaired. See *Hellmich v. Hellman*, 276 U. S. 233, 236-237 (1928); *Zenz v. Quinlivan, supra*, at 917; *Keeffe v. Cote*, 213 F. 2d 651, 656 (1st Cir. 1954); *In re Lukens' Estate, supra*, at 405. Section 115(g) is narrowly concerned with redemptions which are "essen-

tially equivalent to the distribution of a taxable dividend." See p. 28, *supra*. Under the statute the significant question is "one of equivalence"—"whether the transaction has in substance the same characteristics, attributes, and effect as a dividend distribution." *Smith v. United States*, 130 F. Supp. 586, 590-591 (Ct. Cls. 1955). Therefore, when the Commissioner invokes section 115(g), "the effect of the distribution" is "compared with the declaration of a regular dividend." *Giles E. Bullock, supra*, at 292. "We must ask whether, viewing the transaction as a whole, different results were produced by what was in form a partial liquidation from the results that would have been produced, under the circumstances, by a dividend. If such a difference is found, Section 115 (g) is not applicable." *Northup v. United States*, 240 F. 2d 304, 306 (2d Cir. 1957). See further this Court's recent discussions in *Pacific Vegetable Oil Corp. v. Commissioner*, 57-2 U.S.T.C. ¶ 9823 (9th Cir. 1957); and *Phelps v. Commissioner*, 247 F. 2d 156 (9th Cir. 1957).

In view of this guiding principle a distribution in redemption which appreciably impairs a stockholders's proportionate interest is not taxable as dividend income. For the redemption then does not "accomplish the same result as the declaration of a dividend." *Earle v. Woodlaw*, 245 F. 2d 119, 129 (9th Cir. 1957), *cert. denied*, 354 U. S. 942 (1957). It is clearly a partial liquidation of his interest rather than a mere distribution of surplus. See *Commissioner v. Snite*, 177 F. 2d 819 (7th Cir. 1949); *Jones v. Griffin*, 216 F. 2d 885 (10th Cir. 1954); *Northup v. United States, supra*; *In re Lukens' Estate, supra*; *Rollin C. Reynolds*, 44 B.T.A. 342 (1941); *R. W. Creech*, 46 B.T.A. 93 (1942); *Marie W. F. Nugent-Head Trust*, 17 T.C. 817 (1951); *Giles E. Bullock, supra*; *Jackson Howell, supra*; *Estate of Henry V. Foster*, 3 T.C.M. 249 (1944); *Estate of Ira F. Searle, supra*; *Sam Rosania*, 15 T.C.M. 580 (1956); Rev. Rul. 56-183, 1956-1 Cum. Bull. 161; Rev. Rul. 56-540, 1956-2 Cum. Bull. 177.

The same result follows here if E. Royce is deemed to have owned the 350 shares. On that premise his total holdings were 495 shares before the redemption and 145 shares after the redemption. See p. 6, *supra*. The redemption, then, sharply reduced his percentage of ownership and control from 66 percent to 36 percent. As the cited cases indicate, this drastic impairment of equity is the very kind of redemption which is well beyond the reach of section 115(g). A "substantial change in the proportionate ownership and control of the corporation resulted from the distribution." And "the distribution was substantially different from what it would have been had the amount thereof been distributed as a dividend on the common stock." *Jones v. Griffin, supra*, at 887, 890. In the words of Judge Hastie, "through the redemption the taxpayer was doing no more than recouping his original capital investment, giving up in return the ownership rights represented by the redeemed stock. Certainly Section 115(g) was never intended to test the 16th Amendment conception of 'income' by placing such recoupment in the category of taxable income." *In re Lukens' Estate, supra*, at 407.

Section 115(g) still fails to apply, though the 350 shares and the distribution in redemption are attributed to E. Royce.

C. The Tax Court Erroneously Treated the Commissioner's Determination as Evidence

We have argued that the Tax Court's conclusion is irreconcilable with the evidence. We have also argued that its conclusion is largely rooted in one item of inadmissible hearsay. The Tax Court, however, committed still another error. It wrongfully regarded the Commissioner's determination as evidence to be balanced against the petitioners' proof.

At the end of its findings of fact the Tax Court states, "The record fails to overcome the determination of re-

tially equivalent to the distribution of a taxable dividend.” See p. 28, *supra*. Under the statute the significant question is “one of equivalence”—“whether the transaction has in substance the same characteristics, attributes, and effect as a dividend distribution.” *Smith v. United States*, 130 F. Supp. 586, 590-591 (Ct. Cls. 1955). Therefore, when the Commissioner invokes section 115(g), “the effect of the distribution” is “compared with the declaration of a regular dividend.” *Giles E. Bullock, supra*, at 292. “We must ask whether, viewing the transaction as a whole, different results were produced by what was in form a partial liquidation from the results that would have been produced, under the circumstances, by a dividend. If such a difference is found, Section 115 (g) is not applicable.” *Northup v. United States*, 240 F. 2d 304, 306 (2d Cir. 1957). See further this Court’s recent discussions in *Pacific Vegetable Oil Corp. v. Commissioner*, 57-2 U.S.T.C. ¶ 9823 (9th Cir. 1957); and *Phelps v. Commissioner*, 247 F. 2d 156 (9th Cir. 1957).

In view of this guiding principle a distribution in redemption which appreciably impairs a stockholders’s proportionate interest is not taxable as dividend income. For the redemption then does not “accomplish the same result as the declaration of a dividend.” *Earle v. Woodlaw*, 245 F. 2d 119, 129 (9th Cir. 1957), *cert. denied*, 354 U. S. 942 (1957). It is clearly a partial liquidation of his interest rather than a mere distribution of surplus. See *Commissioner v. Snite*, 177 F. 2d 819 (7th Cir. 1949); *Jones v. Griffin*, 216 F. 2d 885 (10th Cir. 1954); *Northup v. United States, supra*; *In re Lukens’ Estate, supra*; *Rollin C. Reynolds*, 44 B.T.A. 342 (1941); *R. W. Creech*, 46 B.T.A. 93 (1942); *Marie W. F. Nugent-Head Trust*, 17 T.C. 817 (1951); *Giles E. Bullock, supra*; *Jackson Howell, supra*; *Estate of Henry V. Foster*, 3 T.C.M. 249 (1944); *Estate of Ira F. Searle, supra*; *Sam Rosania*, 15 T.C.M. 580 (1956); Rev. Rul. 56-183, 1956-1 Cum. Bull. 161; Rev. Rul. 56-540, 1956-2 Cum. Bull. 177.

The same result follows here if E. Royce is deemed to have owned the 350 shares. On that premise his total holdings were 495 shares before the redemption and 145 shares after the redemption. See p. 6, *supra*. The redemption, then, sharply reduced his percentage of ownership and control from 66 percent to 36 percent. As the cited cases indicate, this drastic impairment of equity is the very kind of redemption which is well beyond the reach of section 115(g). A "substantial change in the proportionate ownership and control of the corporation resulted from the distribution." And "the distribution was substantially different from what it would have been had the amount thereof been distributed as a dividend on the common stock." *Jones v. Griffin, supra*, at 887, 890. In the words of Judge Hastie, "through the redemption the taxpayer was doing no more than recouping his original capital investment, giving up in return the ownership rights represented by the redeemed stock. Certainly Section 115(g) was never intended to test the 16th Amendment conception of 'income' by placing such recoupment in the category of taxable income." *In re Lukens' Estate, supra*, at 407.

Section 115(g) still fails to apply, though the 350 shares and the distribution in redemption are attributed to E. Royce.

C. The Tax Court Erroneously Treated the Commissioner's Determination as Evidence

We have argued that the Tax Court's conclusion is irreconcilable with the evidence. We have also argued that its conclusion is largely rooted in one item of inadmissible hearsay. The Tax Court, however, committed still another error. It wrongfully regarded the Commissioner's determination as evidence to be balanced against the petitioners' proof.

At the end of its findings of fact the Tax Court states, "The record fails to overcome the determination of re-

spondent that Bentson was not a bona fide participant in the transactions leading up to the acquisition of Stages stock and was not a bona fide stockholder in Stages at all times material." "The respondent's determination that the corporate distributions by Stages, in retirement of the 350 shares of its stock issued in the name of Bentson and in payment of certain incidental expenses, were made at a time or under such circumstances as to be essentially equivalent to dividends taxable to petitioners, is not overcome by the evidence of record." (R. 236.) Then, toward the end of its opinion, the Tax Court restates the same conclusion. "On this issue," it says, "respondent is sustained for lack of proof of error." (R. 244.)

These quotations reflect a serious misunderstanding concerning the effect of the Commissioner's determination in the light of the taxpayers' evidence.

The Commissioner's determination of a deficiency is initially presumed to be correct. *Old Mission Co. v. Helvering*, 293 U. S. 289, 294 (1934). But this presumption of correctness does not have any weight as evidence. It merely calls upon the taxpayer to produce contrary proof. And when he produces such proof, the presumption promptly disappears. *J. M. Perry & Co. v. Commissioner*, 120 F. 2d 123 (9th Cir. 1941); *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220 (9th Cir. 1942); *Hemphill School v. Commissioner*, 137 F. 2d 961 (9th Cir. 1943). Once the taxpayer has introduced competent and relevant evidence, "the issue depends wholly upon the evidence so adduced and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof." *J. M. Perry & Co. v. Commissioner*, *supra*, at 124.¹⁴ As a scholarly analysis states, "The pre-

¹⁴ For other decisions to the same effect, see *Wiget v. Becker*, 84 F. 2d 706 (8th Cir. 1936); *E. Albrecht & Son v. Landy*, 114 F. 2d 202 (8th Cir. 1940); *Helvering v. Talbott's Estate*, 116 F. 2d 160 (4th Cir. 1940); *Crude Oil Corp. v. Commissioner*, 161 F. 2d 809 (10th Cir. 1947); *Belyea's Estate*

sumption of correctness may not be weighed against the taxpayer's evidence." Ness, *The Role of Statutory Presumptions in Determining Federal Tax Liability*, 12 *Tax L. Rev.* 393, 408 (1957).

Here, however, the Tax Court has done precisely what it should not do. Though the petitioners produced ample evidence in denial of the determination, the Tax Court nevertheless treated the determination as evidence to be weighed in the balance. To use the Tax Court's own words, it twice found that "the evidence of record" failed to "overcome" the "determination." See pp. 59-60, *supra*. But, clearly, there was no "determination" to be "overcome" after the petitioners had produced contrary evidence. "Once such evidence is presented, the presumption becomes inoperative and the issue is to be determined as if there had never been a presumption." Cf. *Webre Steib Co. v. Commissioner*, 324 U.S. 164, 171 (1945). The appropriate question is how the petitioners' evidence compared with the Commissioner's evidence, not whether the petitioners' evidence was more persuasive than the Commissioner's prior determination. Since the Tax Court was concerned with the wrong question, it was able to find that there was "lack of proof of error." At the very least, the petitioners had produced "proof of error," and that proof controlled unless it was impaired by proof from the Commissioner.

The Tax Court's undue regard for the Commissioner's determination is the very kind of error which prompted reversals in *Wiget v. Becker*, 84 F. 2d 706 (8th Cir. 1936), and *Hemphill School v. Commissioner*, *supra*.

v. Commissioner, 206 F. 2d 262 (3d Cir. 1953); *Kentucky Trust Co. v. Glenn*, 217 F. 2d 462 (6th Cir. 1954); and cf. *Del Vecchio v. Bowers*, 296 U. S. 280, 285-286 (1935); *N. Y. Life Insurance Co. v. Gamer*, 303 U. S. 161, 171 (1938); *Webre Steib Co. v. Commissioner*, 324 U.S. 164, 170-171 (1945); *United Business Corp. v. Commissioner*, 62 F. 2d 754, 755 (2d Cir. 1933), *cert. denied*, 290 U. S. 635 (1933); *First Trust & Deposit Co. v. Shaughnessy*, 134 F. 2d 940, 941 (2d Cir. 1943), *cert. denied*, 320 U. S. 744 (1943).

In the *Wiget* case the taxpayer's liability turned on the value of stock as of certain dates. The value fixed by the Commissioner was less than the value set by the taxpayer. The trial court sustained the Commissioner. It ruled, *inter alia*, that "no substantial evidence" had "been introduced" supporting a judgment for the taxpayer; that she had "failed to sustain the burden of proof resting upon her to establish the illegality" of the alleged overassessment; that she had "failed to overcome the prima facie case as established by the assessment;" and that under "the uncontradicted evidence" she was not entitled to any recovery. 84 F. 2d at 707. The Eighth Circuit quickly disposed of this reasoning. "It is apparent from the conclusions of law," Judge Gardner wrote, that "great stress was placed upon the presumption of correctness of the determination" made by the Commissioner. While the determination was presumably correct, the presumption was merely rebuttable. It could "only support a finding in the absence of any substantial evidence to the contrary." The conclusions of law, Judge Gardner continued, indicated that the lower court erroneously treated the presumption as "evidence in the claimant's favor." Both parties had "submitted substantial evidence on the issue before the court, and in that state of the record the presumption passed out of the case." *Id.* at 707-708.

The story was the same in the *Hemphill* case. There the question was whether the corporate taxpayer had accumulated its profits "for the purpose of preventing the imposition of the surtax upon its shareholders." Under the relevant statute the accumulation of profits "beyond the reasonable needs of the business" was "prima facie evidence of a purpose to avoid surtax." Revenue Act of 1934, § 102(a), (b). Both sides introduced evidence, and the Tax Court sustained the Commissioner. It held that the Commissioner's determination was "presumed to be correct and must stand unless overcome by evidence;" that the "burden" was on the taxpayer "to establish that

undistributed accumulated profits were not beyond the reasonable needs of its business;" and that the evidence did "not overcome" the Commissioner's "determination" of surtax avoidance through an accumulation "beyond the reasonable needs of the business." 137 F. 2d at 963. This Court reversed even though the Commissioner had offered evidence in favor of his determination. If "no evidence had been produced," the Court reasoned, the Tax Court "would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct." But the taxpayer produced contrary evidence, and so "the presumption ceased, and thenceforth the issue depended 'wholly upon the evidence'." It was then "the duty" of the Tax Court "to find from the evidence, and from it alone," whether the accumulation exceeded "the reasonable needs" of the taxpayer's business. "No such finding was made." Instead the Tax Court "treated the presumption (which no longer existed) as if it were evidence, weighed it against petitioner's evidence and concluded that petitioner's evidence did not 'overcome' it." This Court remanded the case with explicit instructions to "find from the evidence, and from it alone," whether the taxpayer's accumulation was "beyond the reasonable needs of its business." *Id.* at 963-964.

In this case the Tax Court has done what this Court unmistakably proscribed in the *Hemphill* case. It has wrongly treated the presumption of correctness as having "the quality of affirmative evidence." Cf. *Del Vecchio v. Bowers, supra*, at 285. As in the *Hemphill* case, the Tax Court has regarded the presumption as the equivalent of proof which has to be "overcome." Indeed, the Tax Court's language here is just about the same as the language which caused the reversal in the *Hemphill* case. And as this Court held in the *Hemphill* case, it is immaterial that the Tax Court relied on some evidence produced by the Commissioner as well as his initial presumption of correctness. The vital consideration is that the Tax

Court's conclusion did not derive "from the evidence, and from it alone." See p. 63, *supra*.

Since the Tax Court paid excessive deference to the presumption of correctness, its decision was improperly reached—apart from the other mistakes which contributed to its conclusion. In fact, it is even doubtful whether the Commissioner ever started with any presumption of correctness in his favor. For, as we stated at the outset, the Commissioner made diverse determinations which are incompatible with each other. See pp. 31-32, *supra*. Cf. *Archer v. United States*, 77 F. Supp. 919, 921 (D. Mass. 1948), *rev'd on other grounds*, 174 F. 2d 353 (1st Cir. 1949); *Claire Giannini Hoffman*, 2 T.C. 1160, 1188 (1943); *Lawrence M. Hersig*, 4 T.C.M. 848, 850 (1945).

D. The Payment Is Not Taxable as Dividend Income Even If the Stock Was Acquired Pursuant to a Plan for Redemption

We shall now assume, as the Tax Court erroneously held, that Bentson was a mere straw for E. Royce and the other stockholders. See pp. 30-32, *supra*. Despite the evidence we shall further suppose, as the Commissioner successfully urged below, that they skillfully imported Bentson into the various transactions "pursuant to" a devious "plan" for a quick redemption of the 350 shares. See p. 31, *supra*. Even if these mistaken assumptions are accepted as correct, we submit that section 115(g) does not apply.

Tax statutes, like other statutes, "derive vitality from the obvious purposes at which they are aimed." *Griffiths v. Commissioner*, 308 U. S. 355, 358 (1939). See also *Haggar Co. v. Helvering*, 308 U. S. 389, 394 (1940). The animating purpose of section 115(g) is scarcely obscure. It is designed to reach redemptions of stock which serve as disguised dividends. See H. R. Rep. No. 1, 69th Cong., 1st Sess. 5 (1925); Sen. Rep. No. 52, 69th Cong., 1st Sess. 15 (1926); Conf. Rep. No. 350, 69th Cong., 1st Sess. 30 (1926); H. R. Rep. No. 2333, 77th Cong., 2d Sess. 49, 93

(1942); Sen. Rep. No. 1631, 77th Cong., 2d Sess. 116 (1942); H. R. Rep. No. 2319, 81st Cong., 2d Sess. 53 (1950); Sen. Rep. No. 2375, 81st Cong., 2d Sess. 42-48 (1950). See also pp. 57-58, *infra*. In response to its purpose section 115(g) is carefully confined to redemptions made "at such time and in such manner" as to be essentially equivalent to a dividend. Needless to say, a distribution in redemption of stock is not taxable as a dividend merely because it comes out of earnings or profits. Otherwise the special exception in section 115(g) would leave little of the general rule in section 115(c), which also contemplates the distribution of earnings. See *Commissioner v. Cordingley*, 78 F. 2d 118, 119 (1st Cir. 1935); *Commissioner v. Snite*, *supra*, at 821-823; *Zenz v. Quinlivan*, *supra*, at 917; *Clara Louise Flinn*, *supra*, at 1094; and pp. 28-29, *supra*. "Subdivision (g) makes an exception, but does not turn every partial liquidation into a dividend whenever there are undistributed earnings in the corporation. On the contrary, in such a case the partial liquidation is to be treated as the equivalent of a dividend only when made under certain specified circumstances. It is the time and manner of the liquidation, not the existence of undistributed earnings, which make the distribution essentially equivalent to a taxable dividend." *Commissioner v. Brown*, 69 F. 2d 602, 603 (7th Cir. 1934), *cert. denied*, 293 U. S. 570 (1934). See also *Hyman v. Helvering*, 71 F. 2d 342, 344 (D.C. Cir. 1934), *cert. denied*, 293 U. S. 570 (1934). "There is no inference or presumption which arises solely from a redemption of stock that such redemption is a dividend." *Parker v. United States*, 88 F. 2d 907, 909 (7th Cir. 1937).

The crux of the matter, then, is "the time and manner" of the redemption. And this controlling limitation is quite cogent in the present context where—if the Commissioner's view is right—the redemption was merely a planned step in the acquisition of a close corporate enterprise. According to the Commissioner and the Tax Court, the five petitioners desired to buy only the corporate equity

attributable to 400 shares. The Commissioner expressly determined that they purchased 400 shares in all. The other 350 shares, he concluded, were but temporarily held and expeditiously redeemed as a means of eliminating the balance of the equity which they did not intend to acquire. (R. 25, 88, 128, 188, 201.)

Very often when a close corporation is sold, the buyer does not have enough cash to purchase the entire equity represented by the stock. In these circumstances corporate funds are commonly used in order to consummate the sale. This solution may in any event be appropriate if a substantial portion of the price is otherwise simply a transfer of cash by the buyer for cash in the corporation. In order to effect the sale one of two procedures is followed. The buyer may acquire a portion of the stock, while the seller has the balance redeemed by the corporation. See, e.g., *Zenz v. Quinlivan*, *supra*; *Ray Edenfield*, *supra*. Cf. Rev. Rul. 56-556, 1956-2 Cum. Bull. 177. Or the buyer may arrange a temporary loan, acquire all the stock, and have a portion promptly redeemed in order to repay the loan. The purpose and result are the same, no matter which route is taken. In each case the buyer does not intend to obtain the equity consisting of the cash distributed on the redemption; in each case the redemption is solely designed to enable the buyer to make the purchase; and in each case the buyer invests only in the equity as reduced by the cash distributed on the redemption.

If the first course is followed, the distribution in redemption is clearly not taxable as a dividend to the buyer. *Ray Edenfield*, *supra*. Cf. *Schmitt v. Commissioner*, 208 F. 2d 819 (3d Cir. 1954); *S. K. Ames, Inc.*, 46 B.T.A. 1020 (1942); *Lloyd H. Diehl*, 1 T.C. 139 (1942), *aff'd*, 142 F. 2d 449 (6th Cir. 1944). We respectfully submit that if the second course is followed, the tax consequences to the buyer are no different. Our view is firmly fortified by *Fox v. Harrison*, 145 F. 2d 521 (7th Cir. 1944).

In the *Fox* case the taxpayer and another individual named Cross owned all the stock of a corporation. Cross insisted on a redemption of his shares, but the corporation was not financially able to comply. Therefore, the taxpayer personally borrowed the necessary funds and acquired Cross' shares. In the following year the taxpayer turned in a portion of the shares to the corporation for a sum equal to the price which he had paid for them. He then applied the same amount against his bank loan. The Government argued that the sum received from the corporation was taxable to him as a dividend under section 115(g). The Seventh Circuit was not persuaded.

The Government's theory, the Court declared, was "apparently predicated upon the mere form of the transaction, without giving consideration to the substance. In reality, the involved stock was purchased by the corporation from Cross. That the purchase was not made directly from him was due to the inability of the corporation readily to finance such purchase." The taxpayer "merely supplied the security by which the finances were obtained. The very checks which he received for the stock when it was turned over to the corporation were used in payment of the loan which he had obtained from the bank. He realized no gain or profit on the transaction." The taxpayer acquired the stock "as a temporary expedient" until the corporation would have sufficient funds to take it off his hands. "He had no desire or purpose to make a permanent or personal investment in the Cross stock." The Court concluded, "When we look at the undisputed purpose back of this transaction, together with the 'time' and 'manner' of the distribution by the corporation" to the taxpayer, "we are of the view that it was not 'essentially equivalent to the distribution of a taxable dividend.' " 145 F. 2d at 522-523.

The *Fox* opinion dealt with the acquisition of corporate ownership by an existing stockholder, while the present case involves the acquisition of corporate ownership by

a new group of stockholders. But the *Fox* opinion applies just as aptly here if the Commissioner's understanding of the facts is correct.

As the Commissioner sees the facts, Niederkrome, E. Royce, B. Royce, Jacob and Schneider wished to acquire only 400 of the 750 shares. An agreement was drafted which would have enabled the corporation to redeem the other 350 shares from the sellers.¹⁵ If the transaction had proceeded along those lines, the distribution would not have been a dividend to the buyers. See p. 66, *supra*. That agreement, however, was not executed. Instead, the Commissioner says, the buyers used Bentson as a straw for the 350 shares; and he was used as a straw because they contemplated a prompt redemption of those shares in order to pay off the loan of \$350,000. If this view of the transaction is correct, then, in the fitting words of the *Fox* opinion, the purchasers "had no desire or purpose to make a permanent or personal investment" in the 350 shares. The shares were received "as a temporary expedient" pending their early acquisition by the corporation. The "very" check "received for the stock when it was turned over to the corporation" was "used in payment of the loan" obtained for the acquisition of the stock. And so here, as in the *Fox* case, when we look at "the substance" rather than "the mere form of the transaction"—"the undisputed purpose back of this transaction, together with the 'time' and 'manner' of the distribution"—the redemption is not "essentially equivalent" to a dividend. "In reality" the shares "were purchased by the corporation" from the old stockholders, with the new stockholders merely serving as a conduit. The new stockholders "realized no gain or profit on the transaction."

Our position makes good sense as well as good law. Where the buyer intends to invest in only the corporate equity represented by a portion of the stock, the economic

¹⁵ See p. 4, *supra*.

substance is precisely the same whether the corporation redeems the balance of the stock from the seller or from the buyer. Usually the buyer will prefer to have the seller effect the redemption; and then, of course, the redemption is not taxable as a dividend. But if the seller refuses to turn in a portion of his stock, the buyer has no choice but to acquire the unwanted balance as a mere step in the contemplated redemption.¹⁶ Surely the tax consequences do not critically vary, depending on whether the seller is willing to redeem the undesired shares. Otherwise essentially the same transactions will be diversely taxed for irrelevant reasons. And the buyer will be severely penalized because the seller is stubborn and unyielding. Such "unwitty diversities" should not be gratuitously attributed to Congress—especially where the statute invoked is sensitively concerned with the economic substance of transactions. Cf. *Helvering v. Hallock*, 309 U. S. 106, 118 (1940).

"Taxation, as it has many times been said, is eminently practical" (*Tyler v. United States*, 281 U. S. 497, 503 (1930)), and hence it is responsive to practical considerations. We are only saying what the Commissioner himself usually says and the courts repeatedly approve. "A given result at the end of a straight path is not made a different result because reached by following a devious path." *Minnesota Tea Co. v. Helvering*, 302 U. S. 609, 613 (1938); *Griffiths v. Commissioner*, *supra*, at 358. As the Commissioner recently declared, "In determining the substance of a transaction, the situation as it existed in the beginning and at the end of a series of steps and the object sought to be accomplished should be considered." Rev. Rul. 57-469, I.R.B. 1957-42, pp. 60, 61. This principle seems even more appropriate where the deviation from the straight path was compelled by others. If the buyers here

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had been free to take a direct route, they would have bought 400 shares and the corporation would then have redeemed the other 350 shares. According to the Commissioner, however, the buyers had to take a circuitous route; and so they temporarily acquired the 350 shares before those shares were redeemed.¹⁷ The acquisition was one of those "transitory arrangements" and "procedural devices" which are commonly disregarded for tax purposes because "they add nothing of substance to the completed affair." See *Helvering v. Bashford*, 302 U. S. 454, 458 (1938); *Helvering v. Limestone Co.*, 315 U. S. 179, 184 (1942). For the contemplated end result was an investment limited to the equity inhering in 400 shares.

"Substance and not form controls in applying a tax statute." *Halliburton v. Commissioner*, 78 F. 2d 265, 267 (9th Cir. 1935). We need hardly add that this canon is not a one-way street for the exclusive use of the Commissioner. If a taxpayer sought to avoid a tax "by asking the Commissioner to ignore the actualities, he would shortly and properly be reminded that taxation is an intensely practical matter and that the substance of the thing done, and not the form it took, must govern." The Commissioner is equally restrained from imposing a tax by ignoring the actualities—especially if the actualities reflect his own view of the transaction. Hence he cannot "treat two steps in a single transaction as two separate transactions." See *Prairie Oil & Gas Co. v. Motter*, 66 F. 2d 309, 311 (10th Cir. 1933); *First Seattle D. H. Nat. Bank v. Commissioner*, 77 F. 2d 45, 49 (9th Cir. 1935). That is exactly what the Tax Court has permitted him to do here if the Commissioner's version of what happened is correct.

In support of its position the Tax Court cited *Wall v. United States*, 164 F. 2d 462 (4th Cir. 1947); *Holloway v. Commissioner*, 203 F. 2d 566 (6th Cir. 1953), *aff'g* 10 T.C.M. 1257 (1951); and *Woodworth v. Commissioner*,

¹⁷ See note 16, *supra*.

218 F. 2d 719 (6th Cir. 1955). These three decisions, however, are readily distinguished from the present case.

In the *Wall* case the taxpayer and another individual each owned 50 percent of the stock of a corporation. The two failed to get along, and in 1937 the taxpayer bought the other's stock for \$57,000. The purchase price was payable over ten years, and the deferred payments were represented by notes secured by the acquired shares. In 1939 the taxpayer transferred the shares to the corporation, which, in turn, agreed to pay the remaining notes. The corporation made a payment in the same year, which the Government then treated as a dividend to the taxpayer under section 115(g). The Fourth Circuit sustained the Government on the ground that the corporation's discharge of his indebtedness was in effect a dividend to him. 164 F. 2d at 464. The Court carefully distinguished *Fox v. Harrison, supra*, as involving a temporary acquisition without any true intention of holding the stock as owner. On the other hand, in the *Wall* case the purchase from the other stockholder in 1937 and the sale to the corporation in 1939 were "two distinct transactions." The taxpayer first acquired the stock as an investment and later decided to turn it in. *Id.* at 465-466.

The situation was essentially the same in the *Holloway* case.¹⁸ The taxpayer and another group of stockholders were engaged in litigation. In settlement of the suits the taxpayer bought the stock of his adversaries for \$37,500. He paid this sum out of corporate funds. Later he had the corporation redeem and cancel the acquired shares. The Tax Court concluded that the taxpayer had bought the stock for himself, and that the corporation's concurrent discharge of his obligation to the seller was a dividend. It held that the purchase of the stock and the later redemption of the stock were "two separate and dis-

¹⁸ Our summary of the facts is taken from the Tax Court's opinion in 10 T.C.M. 1257 (1951).

inct transactions." 10 T.C.M. at 1261. The Sixth Circuit affirmed the Tax Court's decision on the basis of its findings.

In the *Woodworth* case the taxpayers were members of a syndicate which in 1943 bought all the stock of a corporation. The purchasers paid for the stock by borrowing the necessary funds from the corporation. In return they gave the corporation promissory notes secured by their stock. At various times between 1943 and 1945 they made payments on the notes. In 1945 the corporation was advised that the issuance of stock for notes was illegal under state law. Therefore, at the end of that year the stockholders surrendered 75 percent of their shares in cancellation of their remaining notes of \$255,000. The Sixth Circuit held that the later cancellation of indebtedness on the redemption of the stock was taxable as a dividend.

The three decisions just summarized are variations of the same theme. In all three the taxpayers purchased the stock involved as an investment for themselves, and later they had the corporation discharge their indebtedness attributable to the prior purchase. Here, however, the situation is quite different if the Commissioner's understanding of the facts is correct. In his view, which the Tax Court affirmed, the five taxpayers did not intend to purchase the 350 shares as an investment. From start to finish they intended the corporation to acquire those shares pursuant to a previously devised plan. Their acquisition of the shares was a mere transitory arrangement which was to be rapidly undone. As in *Fox v. Harrison*, *supra*, the purchasers simply served as a conduit for the corporation.

We have argued that under the Commissioner's own theory of a plan of redemption, the payment of the \$350,000 is not taxable as dividend income. We now submit that even apart from the plan alleged by the Commissioner, the result is the same. Again it is assumed *arguendo* that the

350 shares were held by Bentson for the other five stockholders.

A dividend, as generally understood, is a return on an investment in stock. See *Hellmich v. Hellman, supra*, at 236-237. Section 115(g) is directed against those stockholders who seek to disguise their return as a redemption of stock. See p. 64, *supra*. The scope and design of the statute have been delineated in reports of the House Ways and Means Committee and the Senate Finance Committee. "Assume," the reports state, "that two men hold practically all the stock in a corporation, for which each had paid \$50,000 in cash, and the corporation had accumulated a surplus of \$50,000 above its cash capital." If the corporation redeems, "for cash, one-half of the stock held by them," the redemption is, "in all essentials," the "equivalent of a distribution through cash dividends of earned surplus." H. R. Rep. No. 1, 69th Cong., 1st Sess. 5 (1925); Sen. Rep. No. 52, 69th Cong., 1st Sess. 15 (1926).

As these reports disclose, section 115(g) is not an indiscriminate provision which the Commissioner may loosely apply as he sees fit. At the very least the statute is confined to situations where the distribution consists of earnings over and above the investment of the stockholder. In the Committees' example the stockholders have paid in \$50,000 and the corporation has later earned \$50,000 more. By the same token, section 115(g) does not apply to a redemption of stock held by an intervening purchaser for value who merely receives the amount which he invested in the stock after the surplus was accumulated. The redemption, then, does not represent a distribution of earnings on an investment. It is only the return of the investment itself. *Parker v. United States, supra*. See *Commissioner v. Cordingley, supra*, at 120; *Commissioner v. Snite, supra*, at 823; *De Nobili Cigar Co.*, 1 T.C. 673, 681 (1943), *aff'd*, 143 F. 2d 436 (2d Cir. 1944). If a tax were imposed on the recoupment of the investment,

it would be a levy on capital, not on income. See *Parker v. United States*, *supra*, at 909; *Commissioner v. Cordingley*, *supra*, at 120; *In re Lukens' Estate*, *supra*, at 407. "Economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme." *Helvering v. Stuart*, 317 U. S. 154, 168 (1942).

The rule of the *Parker* case controls here if the 350 shares are attributed to the stockholders other than Bentson. The sum of \$350,000 was paid on the purchase of those shares, and the same sum was paid on their redemption.¹⁹ There is no dividend income to be taxed because only the capital outlay was returned. The situation of Niederkrome effectively demonstrates the point. On July 2, 1945, he bought 55 shares for \$55,000. On June 20, 1946, he had to sell the same 55 shares for \$55,000. (R. 225, 232.) Even if a portion of the 350 shares is imputed to Niederkrome, he still had no more at the end than he had at the beginning. To speak of a dividend here is to conjure a gain out of a return of capital. Yet the Tax Court has charged him with a dividend of \$48,125; and on the basis of this imaginary income he is subjected to a tax of \$32,348.48, a penalty of \$1,940.07, about 12 years' interest of \$23,000, or a total levy exceeding \$55,000—the amount of his investment. Recently the Third Circuit reminded the Tax Court that any attempt to tax a return of capital as a receipt of income needlessly provokes a serious constitutional question. Section 115(g) "was never intended" to place "such recoupment in the category of taxable income." See *In re Lukens' Estate*, *supra*, at 407. Evidently another reminder is not inappropriate.

In the light of our analysis we conclude that section 115(g) does not apply even if the Commissioner's appraisal of the facts is approved.

¹⁹ The small additional payment of \$3,739.73 is considered at pp. 75-76, *infra*.

E. The Incidental Disbursements Did Not Constitute Taxable Income

One small issue remains in regard to section 115(g). On July 19, 1945, Stages gave Davidson of ABC-Portland a check for \$4,315.07. He had billed Stages for this amount as a fee for financing the loan of \$350,000. The payment was charged to an expense account on the books of Stages. (R. 227.) On September 17, 1945, Stages issued a check for \$3,739.73 payable to ABC-Portland. This sum was equal to the interest then due on the loan of \$350,000 and was part of the price paid on the redemption of the 350 shares. The payment was charged to interest expense on the books of Stages. (R. 228, 231.) The Tax Court held that the disbursements for the "incidental expenses" of \$4,315.07 and \$3,739.73 were also taxable as dividends to the five stockholders other than Bentson. (R. 236.) The opinion of the Tax Court states, "As to the item of interest paid by the company in connection with the loan of \$350,000, there is in the record insufficient proof to enable us to hold that respondent erred in his treatment of such item." (R. 244.) The opinion says nothing in so far as the other item is concerned.

In view of our prior discussion little more need be said on the disbursements of \$4,315.07 and \$3,739.73. As Jacob testified, both items were erroneously charged as corporate expenses without his knowledge. Until the Government began its examination, he understood that the servicing fee of \$4,315.07 had been charged to Bentson as an account receivable. (R. 332-333, 342-343.) And the record further shows that the \$3,739.73 did not represent any interest owed by the corporation. See p. 7, *supra*. While book entries are of some evidential value, they do not determine tax liabilities. *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 187 (1918). Besides, if the erroneous entries were deemed correct, they would only indicate that Stages was discharg-

ing its own obligations and not those of its stockholders.²⁰ In any event, regardless of how the two items were entered, neither is taxable as income to the stockholders other than Bentson. One item derived from Bentson's loan of \$350,000, and the other from the redemption of his 350 shares. Hence the two items are no more taxable to them than the \$350,000 which Bentson received on the redemption.

If the disbursements are regarded as pro rata dividend distributions to the other five stockholders, the net result is still the same. Under that view of the matter the disbursements are treated as income to them on the ground that they constructively paid their own personal obligations for the fee and the interest. But if this erroneous premise is pursued, the disbursements are also deductible by them. *George D. Mann*, 33 B.T.A. 281 (1935).²¹

II.

THE ADVANCE BY HIPPODROME TO E. ROYCE WAS NOT A DIVIDEND

In 1945 petitioner E. Royce was one of four shareholders in Hippodrome Amusement Company. He owned about 62 percent of its stock. On December 28th of the same year the corporation advanced \$20,000 to him. This sum was then continuously carried and recognized as a loan. See pp. 9-11, *supra*. Again, however, the Commissioner assiduously imagined some adroit venture in tax avoidance, and so he determined that the advance was a disguised dividend. Once more the Tax Court approved his position because it was inadequately attentive to the evidence. (R. 261-262.)

²⁰ Stages erroneously deducted the two disbursements. The Commissioner has disallowed the deductions, and Stages has concurred in the disallowance. (R. 332-333.)

²¹ A fee paid for a loan is deductible either as additional interest or as an amortizable cost over the life of the loan. *Wiggin Terminals, Inc.*, v. *United States*, 36 F. 2d 893 (1st Cir. 1929); *Julia Stow Lovejoy*, 18 B.T.A. 1179 (1930).

The governing principles are settled. When these principles are applied to the evidence, the advance was clearly what it purported to be—a loan and not a dividend.²²

“It is obvious,” as the Tax Court has held, “that a withdrawal by a stockholder of funds of a corporation does not necessarily constitute a distribution of profits, even if the corporation has an accumulation of profits in excess of the withdrawal; and such withdrawal may or may not, in the light of that fact alone, be said to be a dividend. A corporation may lend its funds, including earnings, with or without interest, upon open account or upon notes, secured or unsecured; and such privilege is not restricted to the lending of its funds to persons other than stockholders.” *Harry E. Wiese*, 35 B.T.A. 701, 704 (1937), *aff’d*, 93 F. 2d 921 (8th Cir. 1938), *cert. denied*, 304 U. S. 562 (1938). Therefore, a corporate advance does not become a dividend merely because the recipient is a shareholder and the corporation has an earned surplus. The important consideration is “whether he took it for permanent use in lieu of dividends or whether he was then only borrowing.” *Wiese v. Commissioner, supra*, at 923. “If the money advanced was in good faith loaned by the corporation” to the stockholder, “then it was not a dividend.” *Moses W. Faitoute*, 38 B.T.A. 32, 35 (1938). “It is the intent at the time the withdrawals were made which is determinative.” *Estate of Helene Simmons*, 26 T.C. 409, 423 (1956).²³

The evidence leaves no doubt that the \$20,000 was requested and received as a loan. From the very outset the

²² The opinion below refers to section 115(a) of the 1939 Code as the “appropriate statute.” This provision sheds no light here. It presupposes that a corporate disbursement is not a loan—which is the very question to be decided.

²³ In *Estate of Helene Simmons, supra*, at 423, the Tax Court adds: “If, at that time, the recipient intended the withdrawal to be a loan which he would repay but, in a later year, changed his mind, the withdrawal still qualifies as a loan in the year made and does not become income until such later year.” See further *Wiese v. Commissioner, supra*.

advance was consistently carried on Hippodrome's records as a receivable due from E. Royce.²⁴ As this Court has held in closely analogous circumstances, a book entry to this effect is "prima facie evidence of a debt," and "in the absence of countervailing evidence would be sufficient to establish the existence of the indebtedness." *Weaver v. Commissioner*, 58 F. 2d 755, 757 (9th Cir. 1932).²⁵ E. Royce should have prevailed on the basis of the entries alone, for the Commissioner failed to produce any "countervailing evidence."²⁶ On other occasions the Commissioner has been very happy to abide by book entries which recorded a loan from corporation to stockholders. See, e.g., *Wiese v. Commissioner*, *supra*; *Hudson v. Commissioner*, 99 F. 2d 630 (6th Cir. 1938), *cert. denied*, 306 U. S. 644 (1939); *Allen v. Commissioner*, 117 F. 2d 364 (1st Cir. 1941). However, the affirmative proof in behalf of E. Royce consisted of much more than corporate entries. Three witnesses, including E. Royce, persuasively confirmed the accuracy of the books. Their combined testimony plainly showed that the directors discussed the advance before it was made; that the advance was approved as a loan and has always been regarded as a loan; that repayment is to be made as soon as the corporation requires the money;

²⁴ The advance was initially carried as a receivable in an account entitled "Due from Stockholders." Later Niederkrome, without consulting anyone, transferred the advance to an account entitled "Notes Receivable—E. Royce." (R. 258-260, 420, 522-523.) When Niederkrome made this change, he was not aware that the Government was asserting a tax on the \$20,000 as dividend income. (R. 523.) E. Royce did not execute a note because he was unwilling to affect the status of the receivable while this litigation was pending. (R. 420, 426-427.)

²⁵ In the *Weaver* case the Commissioner sought to disregard a loan from stockholders to their corporation. The advance was made subject to a "verbal understanding that" it was to be repaid "at some future date." 58 F. 2d at 750. As in the present case, the Tax Court too easily agreed with the Commissioner. This Court reversed.

²⁶ The presumptive correctness of the Commissioner's determination is not "countervailing evidence." When the taxpayer's evidence appears, the presumption disappears. See pp. 59-64, *supra*.

that the corporation expects to be repaid and that E. Royce intends to repay it. (R. 412-413, 419-420, 423, 495-496, 501-502, 526, 566-567.) See further pp. 9-11, *supra*.

All the evidence, written and oral, is uncontradicted. It easily adds up to the one conclusion that the advance of \$20,000 was a loan. See *Wiese v. Commissioner, supra*; *Allen v. Commissioner, supra*; *Comey & Johnson Co., 8 B.T.A. 52 (1927)*; *Moses W. Faitoute, supra*; *Rollin C. Reynolds, supra*; *Irving T. Bush, 45 B.T.A. 609 (1941), remanded on other issues, 133 F. 2d 1005 (2d Cir. 1943)*; *Victor Shaken, 21 T.C. 785 (1954)*; *H. C. Thorman, 12 T.C.M. 963 (1953)*. Undoubtedly, if the corporation had become insolvent, the \$20,000 "would have been subject to recovery by the creditors of the company." *Commissioner v. Cohen, 121 F. 2d 348, 350 (5th Cir. 1941)*. See also *Harry E. Wiese, supra, at 704*; *Moses W. Faitoute, supra, at 35*. Or, "if by reason of a new venture or an expansion of business, the corporation needed additional funds, which were furnished by petitioner and credited on his account, it would not have constituted a contribution of capital but a payment of his indebtedness to the corporation." *Harry E. Wiese, supra, at 705*.

While the Tax Court observed that its decision should derive "from all the facts and inferences found on the record," it nevertheless held that the advance was "intended to be and was in fact a distribution of profits and not a loan to Royce." (R. 262.) The court made no illuminating appraisal of the evidence.²⁷ It simply mustered two arguments for what it described as its "well buttressed" conclusion. First, it had "searched the record in vain for a valid or persuasive reason" for a loan of \$20,000 to a stockholder whose net worth exceeded \$1,000,000. Second, it was equally unable to "find a valid

²⁷ The Tax Court's opinion, after stating the question and the applicable principles, consists of eight sentences. (R. 262.) Of these eight sentences, six merely reiterate in varying ways that the Government is right and the taxpayer is wrong.

or persuasive reason'' why the advance was not repaid if it was a loan. (R. 262.) Apart from these observations, no attempt was made to sustain the result reached.

Here again the Tax Court is grasping at straws. A stockholder's purpose in seeking a corporate advance is irrelevant in determining whether the advance is a loan or a dividend. In either case the stockholder acquires dominion over funds for his own personal use. The relevant question is whether the amount received is to be repaid. See p. 77, *supra*. Advances have been regularly considered loans regardless of the particular purpose which prompted the stockholders to obtain them. See, *e.g.*, *Wiese v. Commissioner*, *supra*; *Comey & Johnson Co.*, *supra*; *Moses W. Faitoute*, *supra*; *Victor Shaken*, *supra*; *Walter Freeman*, 16 T.C.M. 71 (1957). Nor is the Tax Court's conclusion bolstered by comparing the advance of \$20,000 to E. Royce's larger net worth. In fact, at this point its reasoning is exceedingly strange. The Tax Court has repeatedly indicated exactly the opposite—that an ample ability to repay an advance is corroborative proof that the advance was a loan and not a dividend. See *Comey & Johnson Co.*, *supra*, at 54; *Herman M. Rhodes*, 34 B.T.A. 212, 216 (1936), *rev'd on other issues*, 100 F. 2d 966 (6th Cir. 1939); *Rollin C. Reynolds*, *supra*, at 351; *William C. Baird*, 25 T.C. 387, 395-396 (1955); *Estate of Helene Simmons*, *supra*, at 424. If the alleged borrower has "substantial assets" for repayment, his testimony that a loan was intended "cannot be passed over lightly." *Estate of Isadore Benjamin*, 28 T.C. 101, 111 (1957).

We need not spend much time on the Tax Court's second ground—that the evidence does not adequately indicate why the loan was not yet repaid. The matter was fully explained in the oral testimony²⁸ and then completely ignored in the Tax Court's findings. This kind of fact finding

²⁸ See pp. 9-11, *supra*.

is a sufficient commentary on the court's assertion that the "greater probative weight of the evidence" is "in opposition to petitioner's contention." (R. 262.) We may add that "evidence" can hardly have "greater probative weight" if it is non-existent.

The Tax Court also commends its conclusion for the "greater logic" which it reflects. (R. 262.) The "greater logic" is nowhere explained. At any rate, in the quest for logic some important details were too easily overlooked. One ignored item was the past financial nexus between E. Royce and the corporation. As the Tax Court found, in the early years E. Royce had helped to carry the corporation through a decade of losses. (R. 260.) At no time, Niederkrome explained, were any "formal notes signed by the Hippodrome to him." (R. 495.) Since E. Royce had "come to the rescue of the corporation" in the "lean" years, it was reasonable to accommodate him "when the situation was reversed," as long as the corporation did not need the funds. (R. 495, 521-522.) In other words, we have here the common situation where stockholder and corporation have "alternately enjoyed the use of the other's money for different periods." *H. C. Thorman, supra*, at 966.²⁹

The Tax Court also neglected another very informative detail. Apart from E. Royce, there were three shareholders who owned almost 40 percent of the stock. Yet none of them received a comparable payment. "It would not seem reasonable" that stockholders, "owning a substantial amount of stock, would permit another stockholder to withdraw money from the corporation in excess of his pro rata share of dividends and his salary unless there

²⁹ Cf. *Moses W. Faitoute, supra*, at 35: "He could have borrowed the money from a bank, since his credit was good, but the corporation had funds in the bank which were drawing little or no interest, and instead of going to a bank for a loan he went to the corporation."

was to be an accounting to the corporation for such amounts." *Comey & Johnson Co., supra*, at 54. See also *Rollin C. Reynolds, supra*, at 351. We fully concur in what the Government successfully urged in *Commissioner v. Cohen, supra*. A loan is persuasively shown if only one stockholder has made a withdrawal "and no other stockholder either received or had an enforceable right to demand any dividends." 121 F. 2d at 350.

When the advance of \$20,000 was made, Hippodrome's earned surplus was about the same amount. We can think of no reason why three shareholders, owning approximately 40 percent of the stock, would permit a fourth stockholder to appropriate the entire surplus as a dividend. The Tax Court has been similarly unequal to the task of providing a rational explanation.

We submit that the conclusion below has no basis whatever in the record. The Tax Court's authority to weigh evidence is not an authority to ignore it. Cf. *Weaver v. Commissioner, supra*.

III.

DORA F. ROYCE IS A MEMBER OF THE PORTLAND PARTNERSHIP AND HER DISTRIBUTIVE SHARE OF THE INCOME IS NOT TAXABLE TO E. ROYCE

In August, 1942, Dora F. Royce acquired a capital interest of 23.06 percent in Yellow Cab Company, a partnership doing business in Portland, Oregon. She obtained her interest as a gift from her husband E. Royce. She executed the articles of partnership and the Assumed Business Name Certificate; she regularly performed important services in the business and participated in the management; she had her own capital and drawing accounts on the books of the partnership; and she received her share of the profits along with the other partners. See pp. 11-14, *supra*. The Tax Court has held that Dora "was not a bona fide partner," and that her share of the profits for the

years 1944-1947 is therefore taxable to E. Royce. (R. 275-278.) In our view the Tax Court has clearly erred.

The applicable statutes are sections 181 and 182 of the 1939 Code. Section 181 states, "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity." Section 182 provides that each partner shall report his distributive share of the income or losses of the partnership. For present purposes these statutes have been authoritatively construed in *Commissioner v. Culbertson*, 337 U. S. 733 (1949), to which we now turn. The decision below is still another example of the Tax Court's recurring failure to apply the lessons of the *Culbertson* case.

The *Culbertson* case articulates four basic rules. First, the concept of partnership in the income tax law is the same as the concept of partnership in commercial law. "A partnership is, in other words, an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services." 337 U. S. at 740. The question is "one concerning the bona fide intent of the parties to join together as partners;" and a party displays the requisite intent by contributing either services or capital. *Id.* at 743, 747. Or, as Mr. Justice Frankfurter stated in his concurring opinion, family partnerships are not to be disregarded "as partnerships for income-tax purposes even though they be genuine commercial partnerships." The term "partnership" in sections 181 and 182 does not have "a content peculiar to the Internal Revenue Code." The customary criteria which determine the existence of a partnership also "apply in tax cases when the Government challenges the existence of a partnership for tax purposes." "In plain English, if an arrangement among men is not an arrangement which puts them all in the same business boat, then they cannot get into the same boat merely to seek the benefits of §§ 181 and 182. But if they are in the same business boat, although they may have varying re-

wards and varied responsibilities, they do not cease to be in it when the tax collector appears." *Id.* at 750-752, 754.³⁰

Second, if a partner contributes services to the enterprise, the question is not whether the services "are of sufficient importance to meet some objective standard" of the Tax Court, but whether the services indicate an intention to join in the enterprise. *Id.* at 742.³¹ Third, regardless of services the donee of an intra-family gift can "become a partner through investment of the capital in the family partnership." *Id.* at 745. "Original capital" is not "an essential test of membership in a family partnership." *Id.* at 748. Whether the donee has made an investment of gift-capital depends on whether the gift is a true transfer of a participating interest or "mere camouflage." *Id.* at 746-747.³² Fourth, if partners have "agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient." There is "room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership." The Tax Court cannot "substitute its judgment for that of the parties." *Id.* at 744-745.³³

³⁰ For further opinions to the same emphatic effect, see *Miller v. Commissioner*, 183 F. 2d 246, 252-253 (6th Cir. 1950); *Lamb v. Smith*, 183 F. 2d 938, 941 (3d Cir. 1950); *Barrett v. Commissioner*, 185 F. 2d 150, 157-158 (1st Cir. 1950) (concurring opinion of Magruder, J.); *Cobb v. Commissioner*, 185 F. 2d 255, 258 (6th Cir. 1950); *Ginsburg v. Arnold*, 185 F. 2d 913, 916 (5th Cir. 1950).

³¹ See also *Tomlinson v. Commissioner*, 199 F. 2d 674, 676 (5th Cir. 1952).

³² See further decisions cited in note 37, *infra*.

³³ See also *Stanchfield v. Commissioner*, 191 F. 2d 826, 828 (8th Cir. 1951); *Turner v. Commissioner*, 199 F. 2d 913, 916 (5th Cir. 1952); *Estate of Dorsey v. Commissioner*, 214 F. 2d 294, 299 (5th Cir. 1954); *Scofield v. Davant*, 218 F. 2d 486, 489 (5th Cir. 1955).

The Court of Claims has succinctly restated the essence of the *Culbertson* decision as it affects donee-partners. *Williamson v. United States*, 152 F. Supp. 716 (Ct. Cls. 1957). "One may avoid paying taxes on the future income from his property by the drastic remedy of giving away his property. Such a gift may be to anyone at all, certainly including his children. It may be of land, stocks, bonds, or any other kind of property. It may be of a corporate interest or an undivided interest. The only question pertinent in an income tax case is whether he really gave the property away, or only pretended to give it away in order to escape or reduce the taxes on the income." The same settled principle applies to "shares in partnerships as well as to other kinds of property, and even if the partnerships are family partnerships." "Further, the Court in *Culbertson*, held in effect that it is not for the Commissioner of Internal Revenue or the courts to review the action of the parties to the partnership agreement, and, if they determine that the contributions of the questioned partners were not worth what they cost the admitted partners in sharing the profits with them, disregard, for tax purposes, the partnership agreement." 152 F. Supp. at 719.

The rules enunciated in *Commissioner v. Culbertson* are to be read *in pari materia* with the committee reports relating to the later legislation on family partnerships. See Revenue Act of 1951, § 340, amending § 3797(a)(2) and adding § 191 of the 1939 Code; H. R. Rep. No. 586, 82d Cong., 1st Sess. 32 *et seq.* (1951); Sen. Rep. No. 781, 82d Cong., 1st Sess. 38 *et seq.* (1951).³⁴ Though the legislation of 1951 is not retroactive, this Court has appropriately held that the committee reports should nevertheless be

³⁴ Section 3797 (a)(2) of the 1939 Code, as amended, provides: "A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person." See also Int. Rev. Code of 1954, § 704 (e)(1).

“taken into consideration” as very relevant indicia of “the prior status of the law.” *Toor v. Westover*, 200 F. 2d 713, 716 (9th Cir. 1952); *Parker v. Westover*, 221 F. 2d 603, 607 (9th Cir. 1955). See also *Alexander v. Commissioner*, 194 F. 2d 921, 923-924 (5th Cir. 1952); *Thomas H. Brodhead*, 18 T.C. 726, 735 (1952), *aff’d*, 210 F. 2d 652 (9th Cir. 1954). The 1951 legislation is not a sharp departure from the past. The Congressional committees pointedly declared that the newly enacted legislation was designed to express existing tax law, which the Tax Court persistently failed to apply despite the Supreme Court’s admonition in the *Culbertson* case. See H. R. Rep. No. 586, *supra*, at 32-33; Sen. Rep. No. 781, *supra*, at 39. “The House and Senate Reports concurred in finding such additional section was necessary to curb the Tax Court in its erroneous interpretation, since the *Culbertson* decision, of 26 U.S.C.A. Section 182.” *Forman v. Commissioner*, 199 F. 2d 881, 884 (9th Cir. 1952).

“Two principles governing attribution of income,” the reports state, “have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership income. If an individual makes a bona fide gift of real estate, or of a share of corporate stock, the rent or dividend income is taxable to the donee.” The amendment expresses the same principles. It makes “clear that, however the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new partner.” H. R. Rep. No. 586, *supra*, at 32; Sen. Rep. No. 781, *supra*, at 38-39.

The reports next comment perceptively on the aberrations of the Tax Court. “Although there is no basis under

existing statutes for any different treatment of partnership interests, some decisions in this field have ignored the principle that income from property is to be taxed to the owner of the property." The reports particularly criticize the Tax Court's frequent refusal, since the *Culbertson* decision, to recognize partnerships "which arose by virtue of a gift of a partnership interest from one member of a family to another." The erroneous course of the Tax Court, the reports indicate, is not obscured by its repeated references to such verbalisms as "intention," "business purpose," "reality," and "control." In view of the Tax Court's deviations a statute is required "to make clear the fundamental principle that, where there is a real transfer of ownership, a gift of a partnership interest is to be respected for tax purposes without regard to the motives which actuated the transfer." H. R. Rep. No. 586, *supra*, at 32-33; Sen. Rep. No. 781, *supra*, at 39.

The reports also illuminate the legal content of a gift of a partnership interest. The same standards apply in determining the bona fides of such transfers as in determining the bona fides of other transfers between family members. Moreover, a "restriction" on the donee's "complete and unfettered control" of the donated property does not necessarily mean that the alleged gift is a sham. "Contractual restrictions may be of the character incident to the normal relationships among partners. Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. In weighing the effect of a retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit." H. R. Rep. No. 586, *supra*, at 33; Sen. Rep. No. 781, *supra*, at 39-40.

We have said that the committee reports of 1951 mirror the pre-existing law governing family partnerships. This

view is confirmed by Mim. 6767, 1952-1 Cum. Bull. 111, in which the Commissioner has painstakingly appraised the *Culbertson* decision. As this Court has stated, Mim. 6767 has "recognized" the "principles set forth" in the legislation of 1951 and the related committee reports. *Parker v. Westover, supra*, at 607. More specifically, the Commissioner accepts the principle that if capital is a material income-producing factor, a donee of a capital interest in the firm qualifies as a partner. The question, simply, is whether the gift is real or feigned. If the gift is real, it makes no difference that the donee fails to contribute services. In Mim. 6767 the Commissioner particularly denies that there is some separate and additional requirement of "business purpose." "An individual is entitled fully to dispose of his or her property so far as the income tax law is concerned, and may give or sell interests in a business to members of his family. The question with which the law concerns itself is whether the individual has really done so. There is no requirement that intra-family gifts be motivated by a business purpose, which frequently they would not have, before the donee may be recognized as the owner, for income tax purposes, of the property given to him, and the same is true of other antecedent family transactions." "Business purpose" is "satisfied by the single fact (if it be a fact) that the alleged partner has invested in the business money or property, useful to the business, of which he or she is the real owner," even if "such money or property had already been used in the business before the alleged partner acquired any interest therein." *Id.* at 117. See also *Henslee v. Whitson*, 200 F. 2d 538, 540 (6th Cir. 1952).³⁵

³⁵ The Sixth Circuit has stated that "business purpose" is "the continuation and operation of the partnership business." If the donee-partner's "ownership is real, it does not matter what motivated the transfer or whether or not the business profited from the entrance of the new partner." *Wayne v. Glenn*, 222 F. 2d 549, 551 (6th Cir. 1955). See further *Maloney v. Tunnell*, 218 F. 2d 705, 707 (3d Cir. 1955), which indicates that the phrase "business purpose" is not "a requirement that the business enterprise must be benefited by or improved by changing into a partnership."

In the light of the controlling principles we return to the immediate issue. Under those legal standards of judgment Dora must be recognized as a partner unless her interest in the firm was "a mere pretense and a sham." *Seabrook v. Commissioner*, 196 F. 2d 322, 326 (5th Cir. 1952); see pp. 84-85, *supra*. And here there is no occasion for such derogatory catch words and labels unless the legal standards are to be cast aside along with the record.

The evidential facts are essentially undisputed. As the Tax Court itself found, E. Royce gave Dora a capital interest in the business and she executed the articles of partnership along with the other members of the firm. (R. 263-266, 277.) She not only signed as a partner, but was held out as a partner. See pp. 11-12, *supra*. Under the partnership agreement she "had the same legal rights and liabilities as did the other partners with respect to the firm." *Whayne v. Glenn*, 222 F. 2d 549, 551 (6th Cir. 1955). See also *Stanchfield v. Commissioner*, 191 F. 2d 826, 829 (8th Cir. 1951). E. Royce did not retain any special powers or privileges which rendered her interest illusory. Along with the other partners she had "an equal voice" in the business while the partnership continued, and along with them she was to receive her share of the surplus when it dissolved. (R. 265.) The firm continuously kept books which reflected her capital account, her share of the earnings, her periodic drawings, and the balance to her credit. Whenever distributions were made, she took her aliquot portion. See pp. 12-14, *supra*.

Dora had become a full-fledged partner through a gift of a capital interest in the firm. See pp. 84-88, *supra*. Nor is there any doubt that the transfer was complete. It was "permanent, with no interest retained" by E. Royce. "There was no subterfuge or sham about what

he did." *Theodore D. Stern*, 15 T.C. 521, 525 (1950).³⁶ Both E. Royce and Dora positively testified that a true transfer was intended and a true partnership was formed. The Commissioner did not impair their testimony by cross-examination or any evidence of his own. "There are no findings that the witnesses are not to be believed; and any findings that might be made to that effect would be without substantial evidence to sustain them." *Kent v. Commissioner*, 170 F. 2d 131, 138 (6th Cir. 1948). Dora's interest as a partner was no less real than her husband's, and so her share of the firm's income cannot be taxed to him. Our conclusion falls well within the many decisions which hold that the donee of a capital interest in a partnership must be recognized as a partner, quite apart from any services which he may or may not perform.³⁷

So far we have focused on Dora's capital interest in the firm. However, even aside from her investment in the business, Dora qualified as a partner because of the

³⁶ The gift was in stock of the predecessor corporation, which Dora then turned in for her partnership interest. Of course, the fact that E. Royce expected her to join the firm did not affect the definitive nature of her acquired interest. See, e.g., *Walberg v. Smyth*, 142 F. Supp. 293, 297 (N.D. Calif. 1956); *Theodore D. Stern*, *supra*, at 526; *John J. Cunningham*, 10 T.C.M. 800, 801 (1951).

³⁷ See *Lamb v. Smith*, *supra*; *Ginsburg v. Arnold*, *supra*; *Seabrook v. Commissioner*, *supra*; *Henslee v. Whitson*, *supra*; *Marcus v. Commissioner*, 201 F. 2d 850 (5th Cir. 1953); *Nicholas v. Davis*, 204 F. 2d 200 (10th Cir. 1953); *Seofield v. Mauritz*, 206 F. 2d 135 (5th Cir. 1953); *Commissioner v. Brodhead*, 210 F. 2d 652 (9th Cir. 1954), *aff'g* 18 T. C. 726 (1952); *Estate of Dorsey v. Commissioner*, 214 F. 2d 294 (5th Cir. 1954); *Seofield v. Davant*, *supra*; *Fly v. Cole*, 219 F. 2d 653 (5th Cir. 1955); *Wayne v. Glenn*, *supra*; *Williamson v. United States*, *supra*; *Buerger v. United States*, 115 F. Supp. 600 (D. Ala. 1953); *Walberg v. Smyth*, *supra*; *Culbertson v. United States*, 56-1 U.S.T.C. ¶ 9356 (N.D. Tex. 1956); *Goldberg v. United States*, 152 F. Supp. 259 (E.D.N.Y. 1957); *Dickstein v. McDonald*, 149 F. Supp. 580 (M.D. Pa. 1957); *Edward A. Theurkauf*, 13 T.C. 529 (1949); *John A. Morris*, 13 T.C. 1020 (1949); *Clarence B. Ford*, 19 T.C. 200 (1952); *Estate of A. C. Hewitt, Sr.*, 9 T.C.M. 383 (1950); *James J. Gravley*, 9 T.C.M. 821 (1950); *Earl Rhine*, 9 T.C.M. 1078 (1950); *Juliana Schroeder*, 11 T.C.M. 8 (1952); *Royce Kershaw*, 12 T.C.M. 1051 (1953); *Ben Travis Everett, Sr.*, 13 T.C.M. 155 (1954).

services which she contributed. See pp. 83-84, *supra*. Again the significant evidential facts speak very clearly for themselves. See pp. 12-13, *supra*. Dora was a full "working partner." (R. 434.) She shared in the day-to-day operation of the business, and she participated in firm meetings. She was an experienced business woman, and her views were well received and respected. (R. 446.) Cf. *Pike v. United States*, 231 F. 2d 688, 693 (9th Cir. 1956). Her services were important to the enterprise. (R. 430, 450, 542.) If she had not been active in the business, the firm would have had to employ someone else to do her work. (R. 277.) In the Seattle partnership her work was done by "an excellent top-flight man" whom it would be "hard" to replace. (R. 468.) Dora had performed the same services for the prior corporation, and her valuable help had prompted E. Royce to give her a capital interest in the partnership. (R. 450.) Cf. *Ardolina v. Commissioner*, 186 F. 2d 176, 181-182 (3d Cir. 1951). This is not a case where the wife "knew nothing about" the business, "except as a wife ordinarily has general knowledge of her husband's business." *Clarence B. Ford*, 19 T.C. 200, 202 (1952). And Dora's services were obviously "greater than those ordinarily rendered by a wife in her husband's business." *Hartz v. Commissioner*, 170 F. 2d 313, 318 (8th Cir. 1948), *cert. denied*, 337 U. S. 959 (1949). Actually, Dora and E. Royce were the only working partners in the business after November 28, 1942. See p. 12, *supra*.

The Tax Court tries to dispose of Dora's services by characterizing them as "relatively inconsequential." (R. 277.) This disparaging description is no less irrelevant than erroneous. Cf. *Wellington v. Commissioner*, 196 F. 2d 421, 423 (7th Cir. 1952). What the Tax Court has done is to evaluate Dora's services in response to "some" elusive "objective standard" of its own—the very sort of approach which the Supreme Court condemned in *Commissioner v. Culbertson*, *supra*, at 742. It

is not for the Tax Court to say whether certain services are "vital" or otherwise. See *Tomlinson v. Commissioner*, 199 F. 2d 674 (5th Cir. 1952); and see further pp. 84-85, *supra*. Moreover, we are unaware that the Tax Court is especially competent to appraise the importance of services in a taxicab business—particularly where its judgment is wholly at odds with the testimony of those who are presumably informed. The essence of the matter is that husband and wife were working together in accordance with their respective abilities. The fact that E. Royce had more managerial responsibility does not obscure Dora's interest as a partner. *Funai v. Commissioner*, 181 F. 2d 890, 895 (4th Cir. 1950). The delegation of authority in a partnership is "a common practice which is necessary for orderly and convenient operation of such a joint enterprise." *Ginsburg v. Arnold*, 185 F. 2d 913, 915 (5th Cir. 1950). See also *Snyder v. Westover*, 217 F. 2d 928, 935 (9th Cir. 1954).

The Tax Court devotes one meager paragraph to its effort to rationalize its legal conclusion. Its few observations in this paragraph are scarcely illuminating.

The court first notes that the checks covering the distributions "were used to pay income taxes or were largely invested by the husband in various projects in which he was interested." (R. 277.) We fail to see how Dora's payment of taxes on her share of the profits suggests that those profits belonged to E. Royce. Certainly, the Tax Court does not imply that Dora's interest as a partner would have been more firmly established if she had failed to pay her taxes. In addition, the Tax Court is less than meticulous in its remark on alleged investments by her husband. A number of years after Dora acquired her interest in the Portland partnership, she loaned E. Royce \$70,000 for investment in a mining corporation.³⁸ See

³⁸ The corporation was organized in January, 1947. (Ex. 45-SSSS.)

p. 15, *supra*. Nothing in the evidence indicates that the loan derived from a mere abject acquiescence in her husband's wishes. On the contrary, the evidence shows that Dora was a woman with a substantial business background and a judgment of her own. Whatever income she made available to E. Royce on loan "was wholly dependent upon her consent." *Estate of Charles H. Trafton*, 27 T.C. 610, 617 (1957). Dora spent and invested her partnership income as she saw fit. At the same time E. Royce continued to pay the ordinary expenses of the household. See pp. 14-15, *supra*.³⁹

The Tax Court next points to the lack of any evidence that E. Royce filed a gift tax return covering his transfer of shares in the corporation preceding the partnership. (R. 277.)⁴⁰ Here we may echo Hamlet and say that the court "doth protest too much." It is methodically emphasizing what it obviously regards as unimportant. For, as the court found, E. Royce filed a gift tax return reporting his transfer of shares in the Seattle enterprise (R. 267); yet there, too, the court refused to recognize Dora as a partner. See pp. 95-97, *infra*.

Last, the Tax Court obtains some comfort from the following observation: "Inconsistent with her testimony that she performed important services are the statements or the frequent omissions in certain of the partnership returns signed and sworn to by E. Royce indicating that Dora performed no services for the partnership." (R. 277.) E. Royce firmly testified that the erroneous statements about Dora were "typed" in by some employee "who didn't know anything about it." (R. 452-454.) A mistake

³⁹ We are not implying that a wife's partnership interest is to be mechanically disregarded if she helps pay the ordinary household expenses. See *Wilson v. Commissioner*, 161 F. 2d 661 (7th Cir. 1947); *Lamb v. Smith*, *supra*; *Estate of Dorsey v. Commissioner*, *supra*; *James J. Gravley*, *supra*.

⁴⁰ E. Royce explained that he did not report the gift because at that time he took care of his own tax returns and was unaware of any need to file returns of gifts. (R. 445.)

of this kind "may indicate carelessness, but it does not, in our opinion, negative or overcome the evidence that a partnership as claimed was created and did exist." *George E. Reynolds*, 26 T.C. 1225, 1239 (1956).⁴¹ In any event, the Tax Court itself has very ably answered itself. The court clearly dismissed the so-called "statements" and "frequent omissions" in finding that Dora did contribute services that are normally performed by an employee. (R. 272.) This factual determination necessarily rests on the testimony of E. Royce and Dora which the court must have found persuasive. It is not difficult to understand why the court was unimpressed by the erroneous entries on the partnership returns. Whoever made them did not regard them as very meaningful. The same returns (Ex. T, V, W, X) contained related entries stating that B. Royce spent 50 percent of his time in the business, but actually he visited Portland only three or four times a year. (R. 518.) The Tax Court pursued a curious course here. It rejected the entries for the purpose of fact finding and then resorted to them for the purpose of legal reasoning.

We conclude that the Tax Court erred as a matter of law in holding that Dora was not a member of the Portland partnership. There is no finding of sham or lack of good faith in the formation of the firm. See *Snyder v. Westover*, *supra*, at 935. Even if such a finding were made, it would not be responsive to the evidence. The Tax Court's "attribution" of Dora's income to E. Royce was "a distortion of the undisputed facts and a misapplication of the law contrary to the truth and right of the case." *Scofield v. Mauritz*, *supra*, at 141. On the basis of either her capital or her services, Dora was entitled to be recognized as a partner. The Tax Court, however, disregarded both her capital and her services. Dora and E. Royce "are in

⁴¹ In the *Reynolds* case the wife's individual tax return erroneously reported her share of partnership profits as compensation for services, and this mistake was but one among others.

the same business boat." They "do not cease to be in it" because the Commissioner has appeared on the scene. See pp. 83-84, *supra*.

While the Tax Court referred to the *Culbertson* case, it paid scant attention to its principles. They were honored in the breach rather than in the observance. The decision below should be reversed, unless the principles are to become "little more than mumbo jumbo" enabling the Tax Court to do as it pleases. See *Tomlinson v. Commissioner, supra*, at 675. As the Sixth Circuit bluntly stated in reversing the Tax Court, "To some people, the idea of having a wife carry on a business as a partner of her husband seems incredible and to be explained only as some kind of deception. What might be found as to the intention of husband and wife to operate a business as copartners could conceivably be colored by unconscious attitudes as to woman's place in society or views as to the marriage relationship." *Miller v. Commissioner*, 183 F. 2d 246, 253 (6th Cir. 1950).

IV.

DORA F. ROYCE IS A MEMBER OF THE SEATTLE PARTNERSHIP AND HER DISTRIBUTIVE SHARE OF THE INCOME IS NOT TAXABLE TO E. ROYCE

We now turn to the first issue involving Yellow Cab Company, a partnership doing business in Seattle, Washington.

On May 1, 1944, Dora acquired a capital interest in the Seattle partnership through a gift made by E. Royce on April 20, 1944. The firm consisted of ten members. Dora's interest was about 7 percent and E. Royce's interest was about 5 percent.⁴² Neither of the two was active in the business. Another partner, A. H. Wenck, was managing partner in direct charge of the enterprise. As in the case of the Portland partnership, Dora executed the articles of

⁴² The trust created by E. Royce for his daughter Eunice had an interest of about 13 percent. See further p. 97, *infra*.

partnership and the Certificate of Assumed Name; she had her own capital and drawing account on the books of the partnership; and she received her share of the profits along with the others. See pp. 15-19, *supra*. Here, too, the Tax Court has ruled that Dora "was not a bona fide partner." As a result, her share of the profits for the years 1945-1947 has been taxed to E. Royce as his income. (R. 275-278.)

Though in our view the Tax Court clearly erred in regard to the Portland partnership, we are even less able to understand its rationalizations on the Seattle partnership. Neither Dora nor E. Royce actively participated in the Seattle enterprise. Both were essentially passive investors in a business whose income derived from capital plus the efforts of others. She owned her interest as fully as he owned his, and the firm income was no more attributable to him than to her. See *Jones v. Baker*, 189 F. 2d 842, 844 (10th Cir. 1951); *Arthur A. Byerlein*, 13 T.C. 1085, 1091-1092 (1949). And as a mere owner of about 5 percent, he could scarcely exercise undue dominion over partnership affairs even if he were so inclined. In these and similar circumstances, where the income is divorced from any services by the donor-partner, the courts consistently hold that he cannot be taxed on the profits of the donee-partner. *Jones v. Baker*, *supra*; *United States v. Atkins*, 191 F. 2d 146 (5th Cir. 1951); *T. W. Rosborough*, 8 T.C. 136 (1947); *Arthur A. Byerlein*, *supra*; *William Collins, Sr.*, 7 T.C.M. 830 (1948); *Estate of A. C. Hewitt, Sr.*, 9 T.C.M. 383 (1950); *R. G. Bock*, 9 T.C.M. 709 (1950); *Edna Jurgensen*, 9 T.C.M. 1027 (1950); *Juliana Schroeder*, 11 T.C.M. 8 (1952).

Apparently here the Tax Court failed to recall what it thoughtfully held on prior occasions. For example, in *Edna Jurgensen*, *supra*, at 1029, the court stated on the basis of the *Culbertson* case, "It is possible for one who owns capital in a business, but who performs no services

for that business, to make a gift of a part of his capital interest so that thereafter the income from the business attributable to the capital given away is no longer taxable to the donor." The Tax Court made no attempt to explain why the same principle does not apply here. If the attempt had been made, we doubt whether much would have been added. There is no more reason to disregard Dora's interest than to ignore E. Royce's interest. The Tax Court wrongfully attributed to him "the income resulting from the wife's interest in the partnership." *Arthur A. Byerlein, supra*, at 1092.

V.

THE TRUST FOR EUNICE M. ROYCE IS A MEMBER OF THE SEATTLE PARTNERSHIP AND ITS DISTRIBUTIVE SHARE OF THE INCOME IS NOT TAXABLE TO E. ROYCE

The final question involves the trust which E. Royce created for the benefit of his daughter Eunice.

Again the relevant evidential facts are not in dispute. On April 20, 1944, E. Royce executed the declaration of trust. On the same date he transferred to himself, as trustee, 700 shares of stock in Yellow Cab Company of Seattle. When the partnership succeeded the corporation, he signed the articles of partnership as trustee. The capital interest of the trust was about 13 percent. The books of the partnership reflected a separate account for the trust; the trust received its proportionate share of the distributions; and all distributions to the trust were by checks payable to E. Royce as trustee. The checks, in turn, were deposited in a separate trust account. See pp. 19-21, *supra*.

What we have said about Dora's interest in the Seattle partnership also applies to the trust's interest. None of the firm income was attributable to personal services of E. Royce. He was simply a passive investor in the enterprise, and there is no more reason to disregard the trust's

interest than his interest. The trust owned its share of partnership capital just as completely as E. Royce owned his and Dora owned hers. See *Edna Jurgensen, supra*.⁴³ A trust may become a partner through a gift of a capital interest just as an individual may become a partner through an outright transfer. *Henslee v. Whitson, supra*; *Miller v. Commissioner*, 203 F. 2d 350 (6th Cir. 1953); *Scofield v. Mauritz, supra*; *Commissioner v. Brodhead*, 210 F. 2d 652 (9th Cir. 1954), *aff'g* 18 T.C. 726 (1952); *Commissioner v. Sultan*, 210 F. 2d 652 (9th Cir. 1954), *aff'g* 18 T.C. 715 (1952); *Commissioner v. Eaton*, 210 F. 2d 653 (9th Cir. 1954), *aff'g* 11 T.C.M. 734 (1952); *Pike v. United States*, 231 F. 2d 688 (9th Cir. 1956); *Goldberg v. United States*, 152 F. Supp. 259 (E.D.N.Y. 1957); *Dickstein v. McDonald*, 149 F. Supp. 580 (M.D. Pa. 1957); *Theodore D. Stern, supra*; *Clarence B. Ford, supra*.

The Tax Court attempts to distinguish the *Stern* and *Brodhead* decisions with the bare comment that they "are clearly distinguishable on their facts and are of no application here." (R. 288.) However, the Tax Court has discovered some adverse distinction where none exists. Under those decisions the trust for Eunice *a fortiori* qualified as a partner.

In the *Stern* case the taxpayer was controlling stockholder of a close corporation. Because of the excess profits tax he decided to operate through a partnership. He also realized that his own taxes would be less if he gave part of his interest to members of his family. "He chose to use trusts rather than transfer the interests directly to his wife and children so that he could retain control over the

⁴³ In the *Jurgensen* case, which also involved a partnership interest of a daughter, the taxpayer's evidence was substantially less favorable than here. For example, the books did not carry any separate income or capital account for the daughter. Her interest and her parents' interests were "lumped" in one family account. No distributions of earnings to the daughter were intended or made. And when her interest was sold, her share of the proceeds was used to pay a debt of the taxpayer. 9 T.C.M. at 1029-1030.

business and also prevent any part of it from getting" beyond his immediate family. 15 T.C. at 522. The taxpayer established four trusts for his wife and sons to which he transferred portions of his stock. He designated himself as trustee with broad powers of administration. Under the terms of the trusts the corpus was not distributable until after his death unless he provided otherwise. After the trusts were set up, the corporation was dissolved and the business was transferred to a limited partnership. The taxpayer was the sole general partner, and the trusts as well as the other members were limited partners.

The Commissioner refused to respect the trusts as partners, and taxed their share of the profits to the taxpayer. The Tax Court disagreed. It held that the taxpayer had made valid gifts in trust, and that the trusts were partners. "There was no subterfuge or sham about what he did." And his "plan to form a partnership" did "not vitiate the gifts." He "intended to make gifts of the shares and he actually transferred them to the four trusts." The gifts "were permanent, with no interest retained" by him. "There was no reason why he could not give those shares to the trusts. He did every important thing that could be done to give the shares to the trusts. A person may make a complete and valid gift to a trust of which that person is the trustee." After the transfers in trust the taxpayer "never exercised any dominion or control over the shares, except in his fiduciary capacity as trustee." It was unimportant that instead of making outright gifts, he "kept the beneficiaries, as such, out of the business." Though he "retained entire control in himself," it was "of no particular significance since limited partners normally have no part in the control or management of the business." "A substantial economic change took place" in which the taxpayer "gave up, and the beneficiaries indirectly acquired an interest in, the business." 15 T.C. at 525-527.

In the *Brodhead* case the Commissioner did not fare any better. There the taxpayer was the sole proprietor of a merchandising business. He transferred a half interest to a trust for his children, and then formed a limited partnership with the trust. He was the general partner and the trust was a limited partner. A trust company and a business acquaintance were trustees, but they could not exercise their powers of investment without the taxpayer's consent. Similarly, they could not assign the partnership interest of the trust without his approval. As of the date of trial, none of the income from the partnership had been distributed. The Tax Court held that the trust was a partner, and therefore its half of the profits could not be taxed to the grantor. This Court affirmed "on the grounds and for the reasons stated in the Tax Court's findings and opinion." 210 F. 2d at 653.

The Tax Court's reasons moved easily to its conclusion. The taxpayer, the court stated, irrevocably parted with 50 percent of his ownership, which was then contributed by the trust to the partnership. The fact that the contribution consisted of gift capital was immaterial, for the contribution had become the property of the trust. The taxpayer's retained control similarly had no adverse effect. "Trusts normally provide for some degree of control over corpus and/or income by someone other than the beneficiary. If they did not, the transfer would result in an outright gift rather than the creation of a trust." And if "the settlor retains power to control the trustee in some respects in the administration of the trust, the settlor is ordinarily under a fiduciary duty to the beneficiary in respect to the exercise of the power." 18 T.C. at 733-734.

The Tax Court then referred to "the expressed view" of the 1951 committee reports⁴⁴ that "partnership income, where capital is a material income-producing factor, should

⁴⁴ See pp. 85-87, *supra*.

be taxed to the partners if they were the real owners of their interests regardless of how the interests may have been acquired." While the 1951 legislation was not retroactive, "the basic principle of taxing income from property to the owner of the property was the law in the earlier years as fully as it is today." Moreover, as the reports stated, a transferee does not necessarily lack "true ownership" because of powers retained "as a managing partner or in any other fiduciary capacity when considered in the light of all of the circumstances." Brodhead's powers over the corpus in the business "were no more than those of a managing partner, and in the exercise thereof he was required to act in a fiduciary capacity. After a gift is once complete and title has passed to the donee, the fact that the donor subsequently has possession of it does not affect its validity." *Id.* at 735-736.

If any important differences distinguish the present case from the *Stern* and *Brodhead* cases, they are differences which militate against the Commissioner. In those cases each grantor operated the business as sole general partner. Here someone else ran the business. There each grantor contributed significant services as well as capital. Here the grantor was a mere passive investor. There each grantor, as sole general partner, controlled the flow of income to the trust. Here the grantor was but one partner among many. In short, the decision below cannot be sensibly squared with the two decisions which the Tax Court has so casually put aside.

The Tax Court seeks to fortify its conclusion by remarking that no "substantial change" was "made in the economic position of E. Royce or in the management and control of the Seattle partnership. The capital donated by E. Royce to himself as trustee and then, in turn, to the Seattle partnership was part of that which he had previously employed in the business. The conduct of the business remained unchanged." (R. 288.) All this emphasis is con-

cerned with the irrelevant.⁴⁵ Of course, the trust did not affect the "conduct of the business" or its "management and control." For E. Royce had nothing to do with the operation of the business. He was an inactive investor before the trust was created, and he remained an inactive investor after it was created—except that he had given away a portion of his investment.

The Tax Court additionally notes that under the trust instrument E. Royce had broad powers to manage and invest, and to accumulate or distribute income. (R. 288.) But the court at the same time concedes that these powers of administration were bestowed on him as trustee. (R. 288.) Since they were held as trustee, they were fiduciary powers; and fiduciary powers do not disqualify a trust from becoming a partner. *Miller v. Commissioner, supra*, at 353. See further pp. 87, 99-101, *supra*.⁴⁶

As a further reason for ignoring the trust, the Tax Court refers to the loans made by the trust to E. Royce. These loans, says the court, were made "with no more apparent restraint than there would have been had the trust never been declared." (R. 288.) We do not see how the loans impaired the bona fide existence and ownership of the trust. Whenever loans were made, the obligation to repay was

⁴⁵ The Tax Court's argument at this point further reflects its departure from the *Stern* and *Brodhead* decisions. There the trusts were recognized as partners though they were deliberately designed to preserve the grantor's management and control of the business.

⁴⁶ The Tax Court cites, as an adverse factor, E. Royce's failure to "file fiduciary income tax returns for the trust." (R. 282.) Here there seems to be much ado about little. According to the Tax Court's own findings, E. Royce filed separate returns of the trust income which he signed as trustee. (R. 282.) In reporting the trust income he erroneously used the individual tax form because he was unfamiliar with the special form devised for trusts. However, the genuineness of the trust is not in the least affected by this innocent mistake of the trustee. As the Fourth Circuit held, in regard to an analogous failure to file a proper return, tax liabilities are not to be distorted because the taxpayer did not fully "know all the legal consequences of his every act." *Funai v. Commissioner, supra*, at 894. The income tax is not a penalty imposed on laymen for a pardonable lack of legal expertise.

recognized. At the end of 1949 the loans came to \$94,100. Of this total, \$7,100 was advanced to Royce, Inc., and \$87,000 to E. Royce personally. Royce, Inc. repaid the \$7,100 with interest in 1950. As of December 31, 1954, E. Royce had repaid \$5,515, and the balance is represented by notes. See p. 21, *supra*.

In the present context we need not pause to consider whether E. Royce may have strayed beyond the fiduciary limitations which hedge his discretion as trustee. This case involves the taxability of income received by the trust. It "is not concerned with how faithfully the trustee discharged his duties." *Walberg v. Smyth, supra*, at 297. As this Court stated in similar circumstances, whether the loans "constituted sound trust management, or even amounted to misconduct on the part of the trustee, is a question of state law." It does not affect the question whether the trust has otherwise become a partner. See *Pike v. United States, supra*, at 694. The Tax Court itself recognized, in a less favorable situation, that a father's loan from his daughter did not disturb her interest as a partner. *Edna Jurgensen, supra*. Even if E. Royce "took more liberties than the law allows," his action "was more referable" to his position as "head of the household than to any belief that he had not really and truly" made a gift. *Estate of Dorsey v. Commissioner, supra*, at 299-300. The income of a trust cannot be taxed to its grantor by ignoring the fiduciary restrictions which bind him under the principles of trust law. Cf. *Phipps v. Commissioner*, 137 F. 2d 141, 144 (2d Cir. 1943).⁴⁷

The Tax Court cites five decisions as if they inevitably lead to its conclusion. (R. 287.) These decisions are

⁴⁷ The Tax Court states, somewhat accusingly, that little income was distributed to Eunice. Since she was then a minor at school, there was no reason for substantial distributions. If the income had been generously applied for her maintenance, the Commissioner would be the first to argue that the trust should be ignored because its income had been used to discharge the grantor's legal obligation of support.

Economas v. Commissioner, 167 F. 2d 165 (4th Cir. 1948); *Zander v. Commissioner*, 173 F. 2d 624 (5th Cir. 1949); *Stanback v. Robertson*, 183 F. 2d 889 (4th Cir. 1950); *Feldman v. Commissioner*, 186 F. 2d 87 (4th Cir. 1950), *aff'g* 14 T.C. 17 (1950); and *Stanton v. Commissioner*, 189 F. 2d 297 (7th Cir. 1951), *aff'g* 14 T.C. 217 (1950). "The factual situation here," says the court, "cannot be satisfactorily distinguished" from those cases. (R. 287-288.) We consider it neither desirable nor appropriate to engage in a delicate balancing of precedents. We shall merely indicate very briefly that the cited cases hardly compelled the Tax Court to tax the income of the trust to E. Royce. None of them involved a donor-partner who was simply an inactive investor in a business operated by others.

In the *Economas* case the taxpayer was sole owner of a business. She transferred an interest of 25 percent to each of two trusts for her children. She then continued to manage the business as before. In making distributions to herself she arbitrarily retained the profits to which the trusts were simultaneously entitled. "The earnings were due entirely to the taxpayer's efforts and the monies credited on the books to the children, except for a small amount, remained in the business and could not be withdrawn without the taxpayer's consent." 167 F. 2d at 167. In the *Zander* case the taxpayer was also sole owner of the enterprise. He assigned 60 percent to trusts for his children. He then continued to operate the business as before. Except for a few incidental sums, the trusts received none of the profits. The taxpayer ran the business as if there were no trusts.

In the *Stanback* case the trusts were given interests as limited partners. The grantors were the general partners, who had complete control over the operation of the business and the distribution of profits. They were also free to reallocate the trust income within the families of the beneficiaries. In the *Feldman* case the taxpayer owned 35 percent of the business and transferred 13 percent in

trust for his son. Unlike E. Royce, he was actively engaged in the business, which "was created and apparently brought to its successful position largely through" his "efforts". 14 T.C. at 25. Furthermore, despite the recent *Culbertson* decision, the case was decided on the discredited ground that a donee of a partnership interest is not a partner for tax purposes unless he contributes "vital services" or there is some special "business purpose" for bringing him into the business. We have already noted that even the Commissioner has explicitly renounced any such principle. See Mim. 6767, discussed at pp. 87-88, *supra*; and see further pp. 84-85, *supra*.

The *Stanton* case does not require much more to be said. The taxpayer lost there for the simple reason that the alleged partnership was a mere assignee of his personal service income. In addition, he retained and then exercised a right to recapture the interest which he had allegedly given away.

The Tax Court erred in taxing the earnings of the trust to E. Royce.

CONCLUSION

The decisions of the Tax Court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX**I.****Statutes and Regulations Involved**

Act of June 25, 1948, 62 Stat. 945:

§ 1732. Record made in regular course of business; photographic copies.

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

* * *

(28 U.S.C., 1952 ed., § 1732.)

Internal Revenue Code of 1939:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(c) Distribution in Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the dis-

tributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *

* * *

(g) Redemption of Stock.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * *

(i) Definition of Partial Liquidation.—As used in this section the term “amounts distributed in partial liquidation” means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * *

(26 U.S.C., 1952 ed., Sec. 115.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C., 1952 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

(26 U.S.C., 1952 ed., Sec. 181.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.115-5. Distributions in Liquidation.—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and section 29.111-1, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113; but the gain or loss will be recognized only to the extent provided in section 112, and shall be subject to the conditions and limitations provided in section 117.

The term “amounts distributed in partial liquidation” means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series and issuing new shares to replace a portion thereof, or by the complete retirement of

any part of the stock, whether or not pro rata among the shareholders.

In the case of amounts distributed in partial liquidation, the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining taxability of subsequent distributions by the corporation. (See sections 29.27(g)-1 and 29.115-11.)

* * *

Sec. 29.115-9. Distribution in Redemption or Cancellation of Stock Taxable as a Dividend.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. * * *

II.

Respondent's Exhibit A

I, STUART A. WIXSON, hereby certify as follows:

1. I reside at 124 Lake Drive West, Paekanack Lake, New Jersey.

2. I am the Treasurer and Assistant Secretary of CROWN FINANCE COMPANY, Inc., a Delaware corporation, formerly American Business Credit Corporation, the name having been changed from American Business Credit Corporation to Crown Finance Company, Inc. in 1950.

3. There is attached hereto a copy of the Minutes of a meeting of the Executive Committee of American Business Credit Corporation, the Delaware corporation, held on June 20, 1945, at its office at 50 Church Street, New York, New York.

4. At the date of said meeting American Business Credit Corporation, the Delaware Corporation, owned all of the issued and outstanding capital stock of American Business Credit Corporation, an Oregon Corporation, which made the latter a wholly-owned subsidiary of the former.

5. As appears from the Minutes of the meeting of the Executive Committee hereto attached, American Business Credit Corporation, the parent corporation, approved the loan by its Oregon subsidiary, more fully referred to in said Minutes, in the amount of \$350,000.

6. Under the method of operation between American Business Credit Corporation, the Delaware corporation, and its wholly-owned Oregon subsidiary, American Business Credit Corporation would advance to its wholly-owned subsidiary funds needed by the Oregon subsidiary for the transaction of its business, and as appears from the records of the American Business Credit Corporation, the Delaware corporation, and its wholly-owned Oregon subsidiary said loan in the sum of \$350,000 was made

in July, 1945 and was repaid in the month of September, 1945.

7. That the Oregon subsidiary, American Business Credit Corporation, an Oregon corporation, was organized on or about the 25th day of August, 1943 and was dissolved on or about the 27th day of June, 1949, and certain of its records were transferred to the parent corporation in New York City, and that such records are in my general custody.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 21st day of April, 1955.

STUART A. WIXSON

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

On this 21st day of April, 1955, before me personally came STUART A. WIXSON, to me known and known to me to be the individual described in and who executed the foregoing instrument.

CARROLL H. DONOHUE
Carroll H. Donohue
Notary Public,
State of New York
No. 30-0992650
Qualified in Nassau
County
Cert. filed with N.Y. Co.
Clk and Reg.
Term Expires March 30,
1957

AMERICAN BUSINESS CREDIT CORPORATION
MEETING OF EXECUTIVE COMMITTEE

Meeting of the Executive Committee was held in Suite 1460, 50 Church Street, New York, N. Y. on June 20th 1945 at 2:00 P. M. O'clock.

Present: Messrs. Burman, Cashmore and Kincaid of the Committee; and by invitation, Messrs. Dick and Ebe, Vice Presidents of the Corporation, and Mr. Davidson, Vice President of the Corporation's Portland, Oregon subsidiary.

Mr. Kincaid served as Chairman and Mr. Fitzgerald acted as Secretary thereof.

Messrs. Dick and Ebe presented details relating to a financing arrangement requested by Aetna Industrial Corporation, New York, N. Y. Aetna plans to purchase 100% of the capital stock of Utility Construction Co., Inc., New Brunswick, New Jersey for the sum of \$180,000. The Committee was informed Aetna will put up \$30,000 toward the purchase price and wishes to borrow the balance of \$150,000 from ABC. Utility is an old established contracting firm generally engaged in road building and supply of contractors materials.

We would loan Aetna \$150,000 on its demand corporate note and simultaneously Aetna would acquire all the stock of Utility, which would be pledged immediately to us. Within 35 to 40 days from date of our loan Aetna will repay us \$50,000 leaving a balance of \$100,000. At the same time, the accounts of Utility will be assigned to us, wherein the advance on such acceptable accounts will be not less than \$70,000, leaving a balance of \$30,000 on our original loan. If there are insufficient acceptable accounts receivable to permit us to advance \$70,000, Aetna will pay us in cash the difference between \$70,000 and the amount available on the acceptable accounts. Advance on receivables is to be 90% on non-notification basis. The

balance of \$30,000 is to be secured by a first mortgage on land, plant and equipment of Utility, the mortgage to remain unrecorded, unless Utility or Aetna is in default of any of its agreements with us. The mortgage note will be endorsed by Aetna, and ABC will retain as collateral the entire capital stock of Utility till the mortgage is repaid in full. The mortgage is to be repaid in 12 equal and consecutive monthly installments, first due 30 days after the date of the mortgage. We are to have a one year contract for financing the accounts receivable of Utility; over all charge on all money is 12% per annum.

The Committee reviewed in detail the financial condition of Utility Construction Co. as at our examination date, April 30th, 1945, and the operating results for prior years as reflected in the examination, together with the condition of Aetna Industrial Corporation as at our examination date, 12/31/44, and the company's statements as at 3/31/45. Mr. Dick and Mr. Ebe were interrogated in respect to the condition of both companies, and their opinions of the transaction. After reviewing the entire credit file, the Committee unanimously approved the lines as requested, with stipulations as follows:

1. Since Utility Construction is a contracting firm, receivables created will generally rise from contracts being performed. The Committee therefore requires that the Credit Department examine such contracts at the time receivables are assigned to be assured the receivables are in order and to be aware of any hold-back feature, etc.
2. Subject to approval of our counsel.

Mr. Davidson and Mr. Ebe then submitted an application on behalf of ABC-Portland. A group of outstanding individuals in Portland, headed by Messrs. Barney &

Roy Royce and Robert Jacob, desire to purchase the entire capital stock of Oregon Motor Stages, largest intra-state bus company operating in Oregon. Capital stock consists in all of 750 shares Common, par value \$100.00 per share, book value \$537.00 per share. The stock is to be acquired for a price of \$750,000. The purchasers intend to buy 400 shares for \$400,000, with their own funds. They ask that we extend a line of credit of \$350,000, the balance of the purchase price of the Oregon Motor Stages stock. We are asked to lend Mr. Roy Royce, personally, the sum of \$350,000, on his note, to be secured by all of the capital stock of Oregon Motor Stages. Our loan to be repaid in 90 days or adjusted as conditions warrant. Mr. R. Royce's personal statement reflects a net worth of \$1,366,000.00. Retiring stockholders will guarantee to R. Royce and his associates that the worth of Oregon Motor Stages is not less than the figure shown on the company's 4/30/45 statement. A fee of \$5,000 plus 5% per annum on cash for every 90 days is charge contemplated.

The Committee reviewed in detail the financial condition of Oregon Motor Stages as of 12/30/44 and 4/30/45 and its operating results for 1944. Mr. Davidson was questioned in respect to the proposed transaction and Mr. Dick's opinion was received. After consideration and full review, the Committee unanimously approved the credit line requested, subject to approval of counsel, and the following stipulations:

1. Subject to unanimous approval of full Portland Committee.

Mr. Davidson then presented for the Committee's consideration a proposal made by Mr. Buchanan, General Manager of Poole, McGonigle and Jennings, ship repairers in Portland. Mr. Buchanan desires to purchase the assets and liabilities of Hurley Marine Works, Inc. of Oakland,

California. Plant and machinery would not be purchased but leased for a term of two years, with an option to purchase. Hurley operates now under a War Shipping Administration master contract which would be acquired in the purchase. Volume of business done by Hurley in 1944 was \$12,000,000. We would be asked to consider 80% advance on receivables and a 60 day loan of \$300M against the acquiring company's capital stock and the assignment of the two year plant lease. The loan of \$300M would be repaid or converted in 45 days, to a receivable advance. Mr. Davidson said he was not asking for approval of credit lines at this time, but wanted the Committee's thoughts and instructions. The Committee agreed that the volume of business possible appeared attractive. By unanimous vote the Committee authorized Mr. Davidson to indicate our interest and determine whether such a transaction would be agreeable to the Seller. If so, Mr. Davidson was instructed to present the complete transaction for full Committee consideration.

Mr. Burman then presented details of an application by Music Acceptance Corporation. Mr. Mair of MAC and Mr. Hammergren of Wurlitzer Mfg. Co. had discussed with him, a proposed plan for financing the New Wurlitzer Orgatron. The Orgatron will sell at retail for about \$1,200 under Regulation "W" terms, direct collection, with finance charge of $\frac{1}{2}\%$ per month on the unpaid balance for the number of months the transaction runs. Maximum advance by ABC would be 90%. MAC proposed that all dealer and distributor contracts be made in its name, and that ABC have a special set-up with MAC Chicago office so that all time sales created flow thru MAC. MAC proposed that ABC pay its employees in this set-up and as well as a portion of the rent for the space used. Further MAC proposed a maximum yield of 10% to ABC or that ABC pay MAC 25% of net charges. The Committee discussed the proposal

with Mr. Dick, and with Mr. DeMayo, Comptroller of the Corporation, who had been invited to attend this subject on the Committee agenda. After consideration the Committee approved extending a line of credit with the following stipulations:

1. That we would only consider the business offered on a basis of 11% per annum net yield to us.
2. We are not interested in any special operating set-up for Music Acceptance Corporation.

There being no further business, the Committee voted to adjourn.

S. J. FITZGERALD
Acting Secretary

III.

Table of Exhibits

	Identified	Offered	Accepted	Rejected
Petitioner's Exhibit 32	R. 323	R. 323	R. 324	
Petitioner's Exhibit 35	R. 416	R. 416	R. 417	
Petitioner's Exhibit 37	R. 439	R. 440	R. 440	
Petitioner's Exhibit 38	R. 440	R. 441	R. 441	
Petitioner's Exhibit 39	R. 442	R. 442	R. 443	
Petitioner's Exhibit 33	R. 494	R. 500	R. 500	
Petitioner's Exhibit 34	R. 498	R. 500	R. 500	
Petitioner's Exhibit 40	R. 509	R. 511	R. 512	
Petitioner's Exhibit 41	R. 512	R. 513	R. 513	
Peittioner's Exhibit 42	R. 514	R. 516	R. 516	
Petitioner's Exhibit 22	R. 535	R. 535	R. 535	
Respondent's Exhibit NNNN	R. 590	R. 590		R. 591
Respondent's Exhibit OOOO	R. 599	R. 600	R. 601	
Respondent's Exhibit A	R. 611	R. 611	R. 615	
Petitioner's Exhibit 43	R. 618	R. 619	R. 619	
Petitioner's Exhibit 44	R. 619	R. 620	R. 620	

In the
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

vs.

CALIFORNIA DATE GROWERS
ASSOCIATION,

Respondent.

**BRIEF IN ANSWER TO PETITION FOR
ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE RESPONDENT, CALIFORNIA
DATE GROWERS ASSOCIATION**

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Attorneys for Respondent

FILED

MAY 19 1958

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In the
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

vs.

CALIFORNIA DATE GROWERS
ASSOCIATION,

Respondent.

No. 15727

**BRIEF IN ANSWER TO PETITION FOR
ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE RESPONDENT, CALIFORNIA
DATE GROWERS ASSOCIATION**

This is the brief of respondent, California Date Growers Association, filed in answer to the opening brief heretofore filed by petitioner.

JURISDICTION

Respondent raises no issue with respect to petitioner's statements as to jurisdiction, appearing on pages 1 and 2 of its brief.

CORRECTIONS IN PETITIONER'S STATEMENT OF FACTS

The nature of respondent's operations and hiring system, described on pages 2, 3 and 4 of petitioner's brief is accurate. Petitioner has used the heading "Respondent Reduces the Security of Strikers to Punish Them for Striking" on page 4 of its brief. This heading is, of course, purely a legal conclusion and it is not, therefore, a factual statement of the circumstances involved in this case. Respondent admits that it reduced the seniority of some strikers, but it denies that it did so to punish them for striking. Any reduction in seniority that occurred was only incidental to respondent's purpose of keeping its business going at the time the strike occurred.

Although the facts recited under subhead B, page 4, of petitioner's brief are generally correct, petitioner, on page 5 of its brief, refers to the list of March 18, 1954, as a "new seniority list". This list was in fact a Hiring List and it admittedly only included persons who worked during and after the strike. (T.R.¹ p. 247.) Thus, strikers for whom no work was available after the strike, during the 1953-54 season, would obviously not have been included on a list comprising only people who had worked. When hiring began in the 1954-55 season no employee who had gone on strike lost any work or was laid off any sooner because of the March

¹T. R. references are to the Transcript of Record on file with the United States Circuit Court of Appeals for the Ninth Circuit.

18, 1954 list. (T.R. 258, 292.) Respondent will discuss this situation in more detail in the subsequent portions of this brief as it bears on the Board's conclusion that there was discrimination in violation of Section 8(a) (1) and (3) of the Act. It is sufficient to say at this point that the Board's conclusion is based on an erroneous interpretation of the March 18, 1954 list of employees.

On page 6 of petitioner's brief, it is not correct to state that respondent did not inform any employee about its new seniority policy prior to March 18, 1954. (See T.R. 288.) Furthermore, the record shows that a change in seniority had occurred right after the strike commenced and the Trial Examiner so found. (T.R. 281-283, 286.) The petitioner's statement appears to overlook the fact that it was the March 18, 1954 *and* the 1952-53 seniority list that was used in hiring in the 1954-55 season. (T.R. 291-292.)

On page 10 of petitioner's brief, under subsection 4, petitioner reiterates the conclusion of the Regional Director that 12 employees had not quit. It will be observed that the issue involved is whether the Regional Director acted in an arbitrary and capricious manner in determining that these employees did not quit. This issue will be discussed later in this brief, but it is pointed out here to make it clear to the Court that in the first paragraph under this subtitle 4 petitioner is reciting conclusions rather than facts.

SUMMARY OF ARGUMENT

- I. The certification by the National Labor Relations Board is invalid.
 - A. The Regional Director acted arbitrarily and capriciously in permitting the counting of challenged ballots.
 1. The fact that procedural requirements were observed does not excuse arbitrary and capricious substantive findings.
 2. Employees who unconditionally applied for reinstatement and thereafter refused to accept work of a nature previously done by them quit their employment.
 - B. The counting of challenged ballots under the circumstances existing in this case was contrary to the Rules and Regulations of the National Labor Relations Board and was in violation of the Fifth Amendment to the Constitution of the United States.
- II. The respondent did not and has not discriminated against its employees with respect to seniority in violation of the National Labor Relations Act, as Amended.
 - A. The respondent's strike seniority policy was not discriminatory.
 - B. The March 18, 1954 Hiring List was not discriminatory.

ARGUMENT

I. THE CERTIFICATION BY THE NATIONAL LABOR RELATIONS BOARD WAS INVALID.

A. The Regional Director Acted Arbitrarily and Capriciously in Permitting the Counting of Challenged Ballots.

1. The fact that procedural requirements were observed does not excuse arbitrary and capricious substantive findings.

The Regional Director's determination that 12 employees who refused work in a night shift were entitled to vote was supported by no substantial evidence. Petitioner, in its brief (p. 19) states that there was no affirmative evidence that these employees intended to abandon their employment status. In making this statement petitioner overlooks completely the testimony appearing in the Transcript on page 166. (James F. Wright, General Manager of respondent is testifying in response to questions by John Janosco, representing the Union.):

“THE WITNESS: In January of 1954, when we put on the night shift—

MR. JANOSCO: That was after the strike.

THE WITNESS: —and we called the people on the seniority list, when they refused to come back to work, we said that they had lost their seniority and they had quit. We did not fire them.”

Furthermore, the petitioner completely overlooked the fact that these 12 employees had 'unconditionally' applied for reinstatement after the strike. (See petitioner's brief, p. 9.) Petitioner asserts that none of these employees declined a post strike offer of work on the day shift. This is no argument at all because no day shift work was available. Petitioner also states that some of these 12 employees requested day work at the time they rejected the night work. According to the record, only 3 of the 12 indicated a desire for day work; (Beryl Warren, T.R. 172; Catherine White, T.R. 189; Pauline Skinner, T.R. 196.) This generalization on the part of petitioner emphasizes a basic defect in petitioner's argument. It is not clear from the record, nor can any reasonable inference be drawn therefrom to support petitioner's contention that these 12 employees had not quit. Only 4 of these 12 employees testified.

Petitioner states that the Regional Director had no obligation to call the remainder of the 12 employees. Petitioner further argues that respondent had the burden of producing them as witnesses. This argument is patently unrealistic. Does petitioner mean that respondent has the responsibility of producing *all* the evidence in such a proceeding? Must an employer under these circumstances call his own witness to show that the employees quit, and also locate all those who were formerly his employees and subpoena them to appear as witnesses? Petitioner overlooks completely the fact that a union claims to represent these employees and

one or more union representatives participated in all of these proceedings.

Respondent agrees that it may not have been the duty of the Regional Director to call the remaining 8 employees as witnesses. Yet the Regional Director has a duty to investigate these matters (National Labor Relations Board, Rules and Regulations, Section 102.52) and the most important facts in any such investigation would be to find out from these employees whether they had quit. In view of respondent's consistent contention that the employees had quit, it would certainly appear that such inquiry would be the only reasonable determination of fact for the Regional Director to make. Furthermore, it is not necessary to show that employees subjectively intended to quit.

NLRB v. Scullin Steel Co., 161 F. 2d 143 (C. A. 8);

NLRB v. Waples Platter Co., 140 F. 2d 228 C. A. 5);

Arrow Transportation Co., 109 N.L.R.B. No. 19.

It is not clear from the record whether the Regional Director had anything to do with producing the witnesses who were called. It appears from the record that in the course of his investigation he took the statement of at least one of the 12 employees. (Catherine White, T.R. 189.) It can readily be assumed that because of the Union's interest that the Union assumed the responsibility for the production of witnesses who

would support its contention that the challenged ballots of these 12 employees should be counted. With respect to those who did testify, it is not clear from the testimony of Mayme Ruby (T.R. 182) and Lupe Quijades (T.R. 183) whether they had quit or not.

Petitioner correctly states the rule that an "erroneous" or "incorrect" administrative decision, or a "mistake of honest judgment" does not constitute arbitrary or capricious action. (Petitioner's brief p. 22.) But a decision which disregards the only substantial evidence, or a decision based on no evidence of a probative nature has long been recognized as arbitrary and capricious.

Baltimore & Ohio Railroad Company v. United States, 264 U.S. 258, 44 S. Ct. 317, 68 L. Ed. 667;

Inland Motor Freight v. United States, 36 F. Supp. 885.

Petitioner argues that the previous practice of the employer in *not discharging* employees who refused night work is evidence that none of these 12 employees quit. This argument completely begs the issue. In the first place, there is no issue of discharge here. The respondent at no time claims to have discharged these 12 employees. Petitioner infers by its argument that the employer, in order to prove that these employees quit, should have discharged them. (Petitioner's brief p. 20.) It is obvious that no such action on the part of an employer is necessary when an employee has quit. The

termination of employment effectively occurs by the act of quitting. No discharge is necessary.

Petitioner discusses at some length the respondent's prior practice of permitting daytime employees to decline night shift work and still remain on the day shift. (Petitioner's brief p. 19.) Petitioner also discusses respondent's prior practice of recruiting a nucleus of its night shift from day shift employees. (Petitioner's brief p. 10.) In attempting to compare the circumstances surrounding the refusal by the 12 employees to accept night shift work on January 16, 1954, with previous night shift operation of the employer, petitioner fails to recognize that entirely different situations are involved. In the first place, these 12 employees unconditionally applied for reinstatement. This clearly means that they were willing to accept whatever employment opportunities were offered to them. In the second place, the previous night shifts referred to by petitioner were filled from day shift employees, but no effort was made to staff the night shift of January 16, 1954, with day shift employees. The employer, in an effort to provide work for as many of the striking employees as possible, offered the first available work on the basis of the 1952-53 seniority list. By refusing to accept this work, these employees thereby quit and were no longer entitled to have their names on the 1953 seniority list. These were not employees who were already working on the day shift and who decided to continue thereon rather than accept night work. Nor

was the situation similar to a day shift employee who may have preferred not to work any longer that season if he couldn't work days. In either of these cases the employees would have retained their position under the 1953 seniority list and there would be no evidence that they had quit.

2. Employees who unconditionally applied for reinstatement and thereafter refused to accept work of a nature previously done by them quit their employment.

The situation here involves 12 employees who, after having unconditionally applied for reinstatement, were presumably awaiting a call to work. When these employees signed the availability sheet after the strike, their availability was not dependent on being called for a day shift rather than a night shift.

Respondent urges, therefore, that these employees quit by refusing to accept employment that was not in any way more onerous than that which they had performed before. According to the record, the respondent's evidence that these 12 employees quit (T.R. p. 166) stands unchallenged as to at least the 8 employees who did not testify. Nor was any evidence offered or presented by the Board or the Union with respect to these 8 employees who did not testify. The action of the Regional Director in finding that these 8 did not quit was, therefore, arbitrary and capricious. The final tally of votes was 82 for the Union and 78 against, so

these 12 votes (or the 8 who did not testify) were sufficient in number to affect the results of the election. For these reasons the election should have been set aside and the certification of the Union by the National Labor Relations Board as the bargaining agent for the employees was invalid.

B. The Counting of Challenged Ballots Under the Circumstances Existing in This Case Was Contrary to the Rules and Regulations of the National Labor Relations Board and Was in Violation of the Fifth Amendment to the Constitution of the United States.

The Regional Director, contrary to the intent of Section 101.18(3) of the Rules and Regulations of the National Labor Relations Board, permitted the counting of the challenged ballots without the respondent or a representative of the respondent being present.

It is quite obvious that respondent could not in good faith claim an inaccuracy in a count of ballots that occurred outside of his presence. To do so would be to make a charge which would merely create suspicion, because the possibility of proof of any alleged fraud or mishandling would be remote at best.

It thus becomes important not only to the Union and the employer, but to the proper functioning of the Board itself that every reasonable effort be made to avoid a situation similar to that which occurred in the instant case. That interested parties should be repre-

sented at the counting of challenged ballots is an easy but extremely important procedure where on the outcome of such elections, such long-range effects on the parties are involved.

Petitioner's brief, pages 12-13, discloses that no real effort was made by the representatives of the Regional Director to determine if anyone representing the respondent was present in the reception room of the Regional Director's office at the time the counting of the challenged ballots was commenced. Although the letters regarding the time set for the counting of the challenged ballots were addressed to counsel for respondent, copies of each letter were sent to the respondent company. It would certainly appear that if the respondent was also being notified of the time for the counting of the ballots that some effort would have been made to ascertain if a representative of respondent, other than its attorney, was present in the reception room of the Regional Director's office at the time the counting of the ballots was commenced.

For these reasons it is respondent's position that the failure of any effective effort to determine whether a representative of the respondent was present at the counting of the challenged ballots is contrary to the intent of Section 101.18(3) of the Board's Rules and Regulations, and further, is arbitrary and capricious and a denial of due process of law guaranteed by the Fifth Amendment to the Constitution.

II. THE RESPONDENT DID NOT AND HAS NOT DISCRIMINATED AGAINST ITS EMPLOYEES WITH RESPECT TO SENIORITY IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

A. The Respondent's Strike Seniority Policy Was Not Discriminatory.

Respondent's argument with respect to lawfulness of its strike seniority conforms to the findings and conclusions of the Trial Examiner in his intermediate report. (T.R. p. 34.) Although this statement of the Trial Examiner is included in the record (T.R. pp. 54-63), it is being set forth herein for the convenience of the Court:

“Not all acts, however, which have the necessary effect of discrimination against those engaged in protected concerted activities, are unlawful under the Act. An economic striker may be permanently replaced and thus lose his job because of having engaged in a strike, and such action while necessarily and emphatically discouraging union activities, is lawful where it is consistent with, and because of the exercise of the employer's ‘right to protect and continue his business by supplying places left vacant by strikers.’ *Mackay Radio, supra*. Motive controls here because in this situation ‘the (employer's) true purpose is the object of investigation with full opportunity to show the facts.’ *N.L.R.B. vs. Jones & Laughlin Steel Corp.*, 301 U.S. 1. If the employer has the ‘right to pro-

tect and continue his business by supplying places left vacant by strikers,' it would seem to follow that he has also the right to take such other action as he deems necessary 'to protect and continue his business' in the face of an economic strike, providing his motive is, in fact, 'to protect and continue his business,' and not to retaliate against and punish his striking employees. Determining motive in a given situation, frequently requires 'a high degree of introspective perception,'¹³ and this is true here where the discriminatory effect of the Respondent's action on seniority is apparent and substantial. There are certain objective factors present, however, which are invaluable in assessing motive.

"Independent of the action with respect to seniority, there is no evidence of anti-union basis on the part of this Respondent. There is no evidence that this Respondent opposed the unionization of its employees, or was in any way hostile to it. Such elections as were held were held pursuant to consent agreements. It is true that negotiation of an agreement to supersede the contract expiring July 1, 1953, reached an impasse and presumably to break that impasse in its favor the Union called a strike, but no refusal to bargain is charged and no inference of antiunion sentiment can rest on this state of facts. It may be assumed that the Respondent did not like it when its employees struck, but when they applied for reinstatement it took them back as fast as it had work for them to perform. With respect to its action in

¹³*N. L. R. B. vs. Donnelly Garment Company*, 330 U. S. 219, 123. (sic)"

reducing the seniority of reinstated strikers, we have the undisputed testimony of its general manager, James F. Wright, that this action was taken for the purpose of reassuring its non-striking employees and replacements concerning the continuity of their employment, and because it considered such action essential to safeguard and protect its economic interests in continuing to operate during the strike.¹⁴

“If there is something inherently false or specious in this position, I fail to discern it. The strike hit the Respondent when its seasonal operations were at their height since during the Christmas holidays Respondent’s products are particularly in demand. It is not in the least incredible that non-striking employees, and employees newly hired

¹⁴Excerpts from Wright’s direct examinations:

“Q. Now, during the period that you were in operation, did you have conversations with the employees either directly or through representatives with respect to the status of the employees who remained and the status of employees who were employed and the status of employees who would come back to work?”

“A. Yes. I was in, you might say, constant touch with the employees during this period. In fact, I used to pick them up—quite a few of them and escort them into work every morning, and was in contact not only with the employees who remained during the strike and those who were hired during the strike, and also the ones that returned to work during the strike.”

* * *

“Q. What did you do with respect to the (nonstriking and newly hired) employees that I have described here?”

“A. Well, as would be natural under a trying situation, the employees would be concerned with their job security, and I assured them at the time that those who had remained through the strike, the replacements and the people who returned, that they would be—had become and would be treated as the nucleus of our work force; that we didn’t know how long the strike would go on; that we intended to continue to operate the plant and receive and grade and pack and ship our dates, and that these people we felt were a necessary part of our business; and that I gave them the assurance they would be maintained if and when the strike was terminated.”

* * *

Excerpts from Wright’s cross-examination:

“Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and

during the strike, would seek some assurance of preferred seniority status which would protect them from displacement by striking employees when and if the latter chose to return to their jobs, or that an employer would give such assurance if he felt it would bolster his economic situation. It is true that the Respondent did not call any of these employees to the witness stand to corroborate the testimony of its general manager, but neither did the General Counsel call any witness to refute it. I observed nothing in the demeanor of the witness which would lead me to discredit him. To the contrary, I was favorably impressed with his forthrightness and his co-operative attitude throughout the hearing.

“There are factors, relied on by the General Counsel in his brief, to counter this testimony.

wanted personal assurance that they would be taken care of after the strike, you gave it to them?

“A. That’s right.

“Q. And that is about all it amounted to?

“A. Well, you say that is about all. It was a pretty important thing for the people.

“Q. It is very important to a girl who had no seniority and was working during the strike and wondered what would happen to her job when seniority employees offered to come back. I understand that. But I want to know whether your publication of your determination to protect these people went any farther than individual assurances.

“A. I believe, Mr. O’Brien, that I talked—well, I know that during the strike I would talk to the working force that was there every day, and this was one of the primary things these people were concerned about, so I am sure they were advised of it in meetings of all the people who were at the plant. As I recall, I met—I had met with the graders and the people in that area of the plant in one meeting, and met with the packers and the people in the pitting department in that area of the plant at another meeting, but that was a daily occasion during the strike.

“Q. That was to encourage them to get out production, let them know you were with them, is that it?

“A. Well, it covered a lot of things.

“Trial Examiner: Mr. Wright, do you have any distinct recollection whether, during any of these meetings that you had with the employees during the strike, whether you specifically mentioned the matter of their security to them? Do you have a recollection of it?

“The Witness: Yes, I do.”

The old seniority list, posted in the plant, was not removed, it appears, nor was a new one, conforming to Respondent's revised policy, posted. It is remembered, however, that the old seniority list was not entirely discarded; it was still followed as to the order of reinstating the strikers. The union contract having expired, there was no requirement that the Respondent post its revised list or any list at all. There is also some question as to just when a revised seniority (*sic*) list, dated March 18, 1954, was first prepared, but this does not seem very significant inasmuch as it had little, if any, utility until the beginning of a new season.

“Further, it appears that Wright issued no instructions to Florence Hawkins, Respondent's personnel clerk, at a time when, according to Wright, the new seniority policy was instituted, and at the time strikers were reinstated they were not told that their seniority had been reduced. Presumably, the General Counsel would have it inferred from such factors that the reduction in seniority of reinstated strikers, had not actually been determined at the time the strike was concluded and therefore could not have had as its moving cause the protection and continuance of Respondent's business during the period of the strike. In the face of Wright's positive and uncontested testimony to the contrary, I think such an inference is not justified. With a single exception, there is no showing that strikers on reinstatement inquired concerning seniority status and there is no showing of a deliberate withholding of information; nor was there any advice given them contrary to the

position Respondent now asserts. It may well be that Respondent was not impelled to volunteer information which would be adverse to the reinstated striker's interests, until some occasion arose requiring the application of a new policy.¹⁵ Nor does it appear that the situation was such that once the revised seniority policy had been determined, notice of it would necessarily be channeled immediately to the personnel clerk. It was Wright's undisputed testimony that his supervisory staff was advised concerning the new policy during the period of the strike and the General Counsel apparently accepted this testimony inasmuch as no evidence was offered to refute it. Assuming, however, as apparently the General Counsel would have it found, that no definite formula for a revised seniority policy had been determined until after the strike, such delay would have little significance if, as Wright testified, assurances had been given to nonstrikers, during the strike, concerning the continuity of their employment. It is sufficient that the action, when taken, was consistent with such assurances.

"Upon the evidence afforded me, I can only conclude that the General Counsel has not proved

¹⁵Excerpt from Wright's testimony on cross-examination:

"Q. Are you pretty sure that you did not tell any of the returned strikers that they had lost seniority by reason of the fact that some people had continued to work during the strike and they had not?

"A. I didn't personally. One of the problems after a strike when you have people come back, you have the problem of trying to rebuild a coordination between some people who are out and some people that were in, and it isn't too good business policy to agitate that situation at the time they return. You are interested in business continuing.

"Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and wanted personal assurance that they would be taken care of after the strike, you gave it to them?

"A. That's right."

unlawful motive in a situation where motive is controlling. I am unable, in fact, to distinguish the situation here from the seniority displacement of economic strikers which the court found lawful in *Potlatch Forests, Inc., supra*. That decision stands squarely for the proposition that an employer may advance the seniority of nonstrikers to the detriment of economic strikers where the action is consistent with, and for the purpose of protecting and continuing his business during the strike. While in the *Potlatch* decision the court refers to those whose seniority was advanced as 'replacements,' it appears that this term as employed by the court included strikers who returned to their jobs before the strike was ended. I do not perceive a valid distinction between such employees and employees who, as here, never went on strike. Neither were actually 'replacements' as that term was employed in the *Mackay Radio* case. Nor do I think the fact that in the *Potlatch* case the employer announced his new seniority policy before the strike was ended, it is a material distinction. In fact, the case at bar is stronger on its facts because in the *Potlatch* case it appears that the employer had given no assurances to his nonstriking employees that 'their places might be permanent,' whereas the uncontested evidence here is that such assurances were given.

"I do not of course undertake to assess the merits or demerits of the *Potlatch* decision. It is the law—at least in the Ninth Circuit. The Board did not seek certiorari and in my opinion it has

not been overruled in any material respect by the Supreme Court in *Radio Officers* and related cases, *supra*. If the Board does not intend to follow the court in *Potlatch*, it is for the Board and not the Trial Examiner to voice its dissent, and until it does so, I consider myself bound by the court's decision.¹⁶ Accordingly it is found that the Respondent did not violate the Act when, for economic reasons, it gave nonstriking employees and replacements seniority over striking employees."

B. The March 18, 1954 Hiring List Was Not Discriminatory.

Throughout the proceedings in this case the petitioner has insisted that the March 18, 1954 Hiring List was a complete seniority list. Respondent respectfully submits that this is not so. The record shows that no discrimination in fact occurred from the use of this list because in the 1953-54 season employees not on the

¹⁶*Mathieson Chemical Corporation, et al.*, 114 N.L.R.B. No. 85, cited by the General Counsel, is distinguishable, because in that decision the Board said:

"It is highly significant that not until the strike was over, and all the strikers had been put back to work, did the Respondent for the first time decide to separate its employees into two seniority groups for layoff purposes, depending on whether or not they had returned to work before the end of the strike. The Respondent does not claim and there is no suggestion in the record that, as an economic measure to get employees to work during the strike, it had promised them super-seniority. In fact, it does not appear that the matter of relative seniority was ever mentioned to any employees before the end of the strike."

"Other cases, cited by the General Counsel, in which labor organizations have been found to have violated the Act by causing the employer to discriminate with respect to seniority, are inapposite for the simple reason that any action by a labor organization which causes an employer to discriminate is unlawful unless covered by the proviso to Section 8(a) (3) of the Act, and discrimination with respect to seniority is not covered by that proviso."

"list" were employed on the basis of the 1952-53 seniority list. (T.R. 291-2.) The Trial Examiner recognized that no discrimination occurred (T.R. p. 65) but he added that the lack of discrimination resulted because of respondent's "caution" rather than because of employer's recognition of a "retained preferential status." Respondent submits that this finding of discrimination based on nomenclature rather than fact is beyond any reasonable interpretation of the National Labor Relations Act. If this were merely a matter of dialectics, it would be idle for the respondent to argue this point. It does, however, have substantial implications in view of the usual wording of the cease and desist orders used by the Board and the Courts in discrimination cases. In other words, if such an order were made, respondent would be required to post an order demanding that it cease and desist doing something that it had not in fact done. The effect on respondent's employee relationships and the publicity resulting from the promulgation in posting of such an order would be patently unfair and a denial of due process of law contrary to the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be set aside and a new and different order be made ordering a new election to be held.

BEST, BEST & KRIEGER

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Attorneys for Respondent

California Date Growers Association

May 14, 1958.

No. 15727

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CALIFORNIA DATE GROWERS ASSOCIATION, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 15727

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CALIFORNIA DATE GROWERS ASSOCIATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), for enforcement of its order issued against respondent on June 21, 1957, following the usual proceedings under Section 10 of the Act. The Board's decision and order (R. 15-34)¹ are reported at 118 N. L. R. B. No. 29. This Court has jurisdiction of the proceed-

¹ Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

ings since the unfair labor practices occurred in Indio, California, within this judicial circuit.²

I. The Board's findings of fact and conclusions of law

The Board found that respondent violated Section 8 (a) (3) and (1) of the Act by reducing or abolishing the seniority of unreplaced economic strikers after a strike, as a penalty for striking, and violated Section 8 (a) (5) and (1) by refusing to bargain with the certified representative of its employees. The subsidiary facts upon which these findings rest may be summarized as follows:

A. The nature of respondent's operations and hiring system

Respondent's business of processing and packaging dates is seasonal, normally running from late August or early September to the following spring (R. 36; 135-137). The number of its employees varies with prevailing crop conditions both during the season and from year to year (R. 36; 135-136). At the beginning of the season a small force packs dates carried over in storage from the previous season (R. 36; 138-139). As the current crop matures, the work force increases until the seasonal peak in late November or December, when respondent is usually able to employ all qualified persons seeking employment (R. 36; 157-158). After the first of the year the work force tapers off again and most em-

² Respondent, a California corporation with a packing house in Indio, California, processes and packages dates and annually ships over \$50,000 worth of its products to points outside the State of California. No jurisdictional issue is presented (R. 35-36).

ployees are laid off by March or April, although a few may continue to work as late as May (R. 36; 158-159).

Prior to 1952 respondent maintained a priority list of employees based on payroll records of the previous season and accorded those on the list, who applied for work at the start of a season, preferential hiring status over other applicants for employment (R. 10, 36-37, 51; 142-143, 289-290). In October 1952 respondent and the certified representative of its employees³ entered into a collective bargaining agreement which made departmental seniority the determining factor for layoffs and rehiring, with the proviso that no employee was eligible for seniority status unless he had worked 12 weeks or 51% of the previous or current season (R. 6-7, 12, 38-39; 280, 140-141). In November 1952 respondent compiled a seniority list, which included the names of employees on the old priority list plus those who had obtained seniority under the terms of the contract, and posted a copy in the packing shed (R. 51; 227-229, 289-90). Although the union contract expired on July 1, 1953, respondent followed the 1952-1953 seniority list in recruiting employees during the fall of 1953 (R. 51; 38, 12, 227-231). Employees on the list were notified when respondent intended to begin operations and were advised to submit applications so that respondent might determine their current availability for

³ The Union was then known as United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, but subsequently changed its name to United Packinghouse Workers of America, AFL-CIO, Local Union No. 78 (R. 37; 199).

work (R. 51-52; 230-231). As employees were needed, respondent recalled all such applicants in the order of their position on the seniority list before hiring applicants not on the list (R. 51-52; 231-232, 157-159, 187). At the end of the season, employees were also laid off according to the seniority list (R. 158, 246).

B. Respondent reduces the security of strikers to punish them for striking

On December 1, 1953, following an impasse in negotiations for a new contract, the Union called a strike against respondent (R. 39, 52; 8, 12). Respondent continued to operate with non-strikers and some replacements (R. 39, 52; 8, 12, 234, 281).⁴ On December 8, the Union notified respondent that it was terminating the strike and that the strikers would "return to work immediately" (R. 52; 104-105, 281). Substantially all the strikers reported at the packing shed the same day to sign an availability list (R. 39-40; 235-236, 256). While the amount of work was sharply curtailed after the strike, because of the loss of the Christmas market and a poor date crop, respondent reinstated all strikers for whom work was available in the order of their position on the 1952-53 seniority list (R. 40, 52; 236-237, 239-

⁴ Respondent replaced some 35 employees during the strike. Most of the replaced strikers were comparatively new employees and had no seniority rights under the collective bargaining contract. The remainder had worked long enough to acquire seniority rights under the contract. The Board recognized, as to any striker who had been replaced, either status or non-status, that he had no further right to employment (R. 25-26, 52, n. 8). Consequently there is no issue here as to either category of replaced strikers (R. 266).

245, 250, 167, 292, 192, G. C. Exh. 3).⁵ Twelve former strikers, who were offered work on a new night shift on January 18, refused the offer for personal reasons (R. 18, 40; 236-241, 188-189, G. C. Exh. 3). Some former strikers who were on the seniority list, and all who were not on the list, received no more work for the rest of the season (R. 20, 22, 40; 265-266, 271 G. C. Exh. 2-0, 4).

Virtually at the end of the 1953-54 season, about March 18, respondent prepared a new seniority list comprising the names of employees who worked during and after the strike (R. 18-23, 52-53; 246-247, G. C. Exh. 4). Reinstated strikers were dropped to the bottom of the list, their seniority, like that of new employees, dating from the day of their return to work after the strike (R. 52-53; 245 G. C. Exh. 4). Strikers not reinstated, who had seniority status under the 1952-53 list, were excluded from the new list altogether (R. 18, 64-65; 265-266, 269, 271 G. C. Exh. 4, G. C. Exh. 2-0).⁶ The March 18, 1954 list

⁵ Certain exhibits, consisting mainly of lengthy lists of employees, although designated for printing by the Board, were not included in the printed Transcript of Record. Since we do not believe that there is any controversy about the facts which these exhibits were intended to verify, we are not requesting that the missing exhibits be printed in a Supplemental Transcript of Record. Should it develop that we are in error in this regard and should the Court desire it, we will have such a Supplemental Transcript of Record printed. We refer to these unprinted exhibits, which have been filed with the Court, by their exhibit numbers.

⁶ The Board made no findings as to the precise number of employees affected by respondent's changed seniority policy. However, the documentary evidence—i. e., respondent's hiring records and seniority lists—shows roughly that there were about

was first used in the 1954-55 season (R. 23, 64-65; 249-250, 253). Employees on the list were the first to be called to work in the fall, and the last to be laid off when the work force was reduced (R. 52-53; 253, 277-278).

Respondent did not inform any employee about its new seniority policy prior to March 18 (R. 21; 249, 284-286). During the strike some employees then at work had come to General Manager Wright and expressed concern for their job security. Wright told them they had become the "nucleus of our work force" and "would be maintained if and when the strike was terminated," but made no commitment as to seniority (R. 21; 281-283, 286). Wright did not interview any employees hired during the strike at the time they were hired, and did not instruct his subordinates to promise them preferential seniority (R. 22-23; 291). Nor did Wright or any other representative of respondent mention any loss of seniority to those strikers who were reinstated after the strike (R. 21, 59; 285-286). At the hearing Wright attributed his

290 employees at work when the strike occurred, of whom 130 had seniority status (R. 265-266, G. C. Exh. 3, 2-0). About 105 of the employees with status went on strike, 29 of them were reinstated but subsequently had their seniority reduced, approximately 68 were deprived of their seniority status altogether, and 8 were replaced (G. C. Exh. 2-0, 4, 3). In connection with the representation proceeding, respondent conceded that except for these 8, none of the strikers with seniority status was replaced by any employees taken on during the strike (R. 123-124; Exh. 2-0). It should be noted that the 1952-53 seniority list used for determining voting eligibility marks 8 employees as replaced, while the Regional Director's Report on Challenges is concerned only with the 5 who attempted to vote in the election.

silence to a desire not "to agitate that situation at the time they return" because, as he expressed it, "You are interested in business continuing" (R. 22; 286). Respondent's personnel chief, Florence Hawkins, who had charge of the seniority list and the recruiting of employees, was not apprised of the new policy until February 1954 (D. 6, 59; 284-285). When one of the strikers inquired concerning her seniority status in January 1954, Hawkins replied that she "did not know" and "couldn't tell her a thing about it" (R. 23; 246). The old 1952-1953 seniority list remained posted after the strike and was used by Hawkins in recalling strikers during the balance of the 1953-1954 season (R. 23, 59; 237, 239, 249).

Upon the basis of the foregoing facts and the entire record, the Board found that respondent reduced or abolished the seniority of the strikers after the strike in order to punish them for striking. In so finding, the Board rejected respondent's contention that it adopted its new seniority policy for economic reasons as a means of continuing business during the strike. The Board accordingly concluded that respondent's conduct was violative of Section 8 (a) (3) and (1) of the Act (R. 18-23).⁷

⁷ The Trial Examiner had found that respondent's illegal motivation was not proved, and that therefore its reduction of the strikers' seniority below that of nonstrikers and replacements was not in violation of the Act. He found, however, that respondent violated Section 8 (a) (3) and (1) of the Act by depriving strikers not reinstated after the strike of all seniority rights (I. R. 8-15). Both the Board and the Trial Examiner concluded that there was no substantial evidence that respondent, in requiring aptitude tests for some employees during the 1954-1955 season, applied the test discriminatorily against the strikers (R. 26, 68-72).

C. Respondent's refusal to bargain

1. *The consent election agreement*

On December 9, 1953, respondent filed a representation petition with the Board pursuant to Section 9 (c) (1) (B) of the Act, and thereafter entered into a consent election agreement with the Union (R. 37; 100-103, 105-111). This agreement provided that the employees eligible to vote "shall be all persons who were employed in the bargaining unit set forth above⁸ during the last complete payroll period in January 1954, and including all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election" (R. 47-48; 109-110). The agreement further provided that the election should be conducted "in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election" (R. 105-106).

⁸ The agreement provided that the appropriate unit included "all packing shed employees employed by the Employer at its Indio, California packing shed; excluding all office and clerical employees, and also excluding watchmen, guards, supervisors, and professional employees as defined in the National Labor Relations Act, as amended" (R. 109).

2. The election

The election was held on February 18, 1954. Of the 204 employees voting there were 69 votes for the Union, 70 against, and 65 ballots were challenged by either respondent or the Union (A. 41; 112, 116). Among the challenged ballots were those of the 12 former strikers who declined night shift work after the strike, and who, according to respondent, had quit their employment. After an investigation, the Board's Regional Director issued a Report on Challenges in which he overruled the challenges to their ballots (R. 40-41; 126-130).

3. Respondent's objection to the counting of the ballots of the 12 strikers who declined night work

Thereafter respondent filed exceptions, objecting only to the disposition of these twelve ballots, and requested a hearing (R. 41). Following the hearing and after receiving briefs from both respondent and the Union, the Regional Director issued a Supplemental Report on Challenges in which he again concluded that the 12 employees were entitled to vote (R. 41, 200-205). Upon the basis of the record at the hearing, the Regional Director found as follows:

Each of the 12 former strikers who cast a challenged ballot had status on the 1952-1953 seniority list and applied unconditionally for reinstatement on December 8, 1953 (R. 202; 144, 126). At the time of their application there was insufficient work to permit their recall (R. 202). On January 16, 1954, as noted above, respondent added a night shift and

offered this work to the 12 employees at issue (R. 200; 126, 143-144). All twelve had been on the day shift prior to the strike and each declined the offer of night work for personal reasons (R. 202; 126-130, 143-144, RM Tr. 97). Some of them simultaneously sought day work (R. 202; 126, 172, 189, 194, 195-196).

Normally when adding a night shift, respondent recruited at least a nucleus of the night crew from employees working on the day shift, but the day shift employees were free to refuse the transfer without being laid off, discharged, or regarded as having quit their employment (R. 203; 153, 171, 173-174, 176-177, 180, 182, 184).⁹ Moreover, the employment applications which respondent required employees to fill out each season, contained a question as to whether the employee was willing to accept night work (R. 202-203; 144-145). Employees who answered no, or left the question blank, were nevertheless considered for and given day work (R. 203; 144-145).

4. The Regional Director's rejection of respondent's objection and his certification of the Union

In view of the foregoing and the absence of affirmative evidence as to any act or word on the part of the

⁹ General Manager Wright testified that prior to the institution of the seniority list employees willing to work nights short weeks, and during hot weather were given a preferential place on priority list with the result that they were called to work sooner at the beginning of a season and retained longer at the end of the season (R. 146-147, 164-165). He testified further: "I wish to point out then * * * that a person who wasn't willing to work nights, wasn't willing to work shorter weeks wasn't willing to work during hot weather, that that person wasn't laid off or fired because of it but they were the last hired and the first to be laid off" (R. 165).

12 employees, which would establish an intent to resign from or abandon their employment status, the Regional Director concluded that the declination of night work did not constitute a quitting of their employment (R. 204-205). Since respondent admittedly did not discharge them for their action (R. 204; 166), and they had not quit, the Regional Director found that they were eligible to vote under the terms of the consent election agreement and directed that their ballots be opened and counted (R. 204-205).¹⁰

Including the ballots of the 12 strikers who had declined night shift work, the Union had a majority of 82 to 78, and the Board, on October 19, 1954, accordingly issued a revised Tally of Ballots to this effect (R. 214). On October 21, 1954, the Regional Director certified it as the bargaining representative of respondent's employees (R. 41; 261-217).

5. Respondent's further objection to the counting of the ballots in its absence

Respondent then filed further objections to the election on the ground that the challenged ballots were opened and counted in its absence (R. 219-220). The facts upon which this objection is based are set forth in a letter the Regional Director wrote respondent's

¹⁰ The Regional Director also rejected respondent's contention that two of these employees who gave illness as their reason for declining night work, lost their employee status because of their failure to apply for a leave of absence (R. 205-206). Respondent did not discharge them, and the Regional Director found no credible evidence in the record that employees were required to obtain leaves of absence or sick leave while they were laid off with no real expectation of being recalled for six or more months (R. 205).

counsel following his investigation of the matter and were in essential point confirmed by General Manager Wright at the subsequent hearing in this case (R. 17, 44-45; 221-224, 296-299):

As to the failure of you or your client to be present at the time the ballots were counted, you will recall that the Supplemental Report on Challenges designated October 11, 1954 at 2:00 p. m. at this office as the time and place for the counting of these ballots. Subsequently, on October 13, 1954, you requested an additional week before the count was made. On October 14, Field Examiner Helbling addressed a letter to you in which he indicated, among other things, that the count of the challenged ballots would be put over until 2:00 p. m., October 19, 1954 at this office. He also pointed out that Field Examiner Carl Abrams would, in his absence, conduct the conference. On October 19, you addressed a letter to me, in which you stated, in part, that the appearance of a representative of the Employer at our Office on October 19, 1954, at 2:00 p. m., pursuant to our order that the challenged ballots be opened and counted, should not be regarded as a waiver by the Employer of his objections to the challenges.

From the personnel in this office who were involved in the matter, I learned that the union representative arrived at approximately 1:50 p. m. to be present for the purpose of observing the count; that at approximately 2:05 p. m., Mr. Abrams asked the union representative to agree to a delay until 2:15 p. m., with the

understanding that, if at that time no representative of the Company had appeared, the ballots would be opened. The union representative agreed to this. At 2:15 p. m., no person had appeared and asked for Mr. Abrams or identified himself in connection with this case. Mr. Abrams then inquired at the reception desk for you and was advised that you had not yet arrived. It appears that a gentleman did appear at the reception desk at approximately 1:45 p. m. and informed the receptionist that he was to meet you here. He inquired if you had arrived and was advised that you had not. He did not state to our receptionist his name or that it was a Labor Board matter with respect to which he was meeting you here. Mr. Abrams, upon being informed by the receptionist that you were not here, asked a second Field Examiner to witness the opening and counting of the ballots, which was done in your absence.

It appears that, shortly after 2:30 p. m., you appeared and were informed by the receptionist that there was a gentleman waiting for you; that you, together with the other person, presumably Mr. Wright of the Company, then walked out of the office. In the interim, Mr. Abrams completed the count. Upon being advised by the receptionist that you had just arrived and stepped out with someone, Mr. Abrams, upon your return, explained to you the above facts and displayed the ballots to you as well as the tallies.

The Regional Director concluded that none of his personnel had acted in an arbitrary manner (R. 223-224).

6. Respondent's refusal to recognize the certification

Therefore, ^{after}respondent admittedly refused to bargain with the Union, taking the position that the certification was invalid because the Regional Director (1) was arbitrary and capricious in ruling that the 12 employees who declined night work were eligible to vote, and (2) permitted the challenged ballots to be opened and counted in the absence of respondent (R. 16-18, 42-43; 260-262). The Board, after examining the record in the representation proceeding, found that the Regional Director's ruling with respect to the challenged ballots was reasonable and supported by substantial evidence (R. 16-17, 45-51). The Board further found that the counting of the ballots in respondent's absence was not arbitrary or capricious under the circumstances described by the Regional Director and confirmed by General Manager Wright at the unfair labor practice hearing (R. 17, 44-45; 297-299, 220-224). Concluding that the Union's certification was valid and proper, the Board found that respondent's refusal to bargain was accordingly violative of Section 8 (a) (5) and (1) of the Act (R. 44-45, 51).

II. The Board's order

The Board ordered respondent to cease and desist from the unfair labor practices found and from in any other manner infringing upon its employees' exercise of their rights under Section 7 of the Act (R. 27-28). Affirmatively, the Board ordered respondent to bargain with the Union upon request; to rescind its discriminatory seniority policy; to restore to their

prestrike seniority all unreplaced strikers on the 1952-1953 seniority list who requested reinstatement, except the 12 employees who declined night work; to restore these 12 to reduced seniority at the end of the seniority list;¹¹ to offer the discriminatees reinstatement on the basis of their restored seniority and make them whole for any loss of employment suffered because of the discriminatory seniority policy, and to post appropriate notices (R. 28-30).

SUMMARY OF ARGUMENT

I. The Board properly rejected respondent's contention that the certification was invalid. The Regional Director's determinations in the underlying representation proceeding were made "final and binding" by the consent election agreement and "can be set aside only where they are arbitrary or capricious" (*N. L. R. B. v. Carlton Wood Products*, 201 F. 2d 863, 866 (C. A. 9)). There is no basis for the claim that the Regional Director was arbitrary in permitting the 12 strikers who refused night work to vote in the election. Similarly without foundation, under the circumstances of this case, is respondent's further contention that the Regional Director was arbitrary in permitting the challenged ballots to be opened and counted in respondent's absence. Accordingly, the Board properly found that respondent violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the certified representative of its employees.

¹¹ In remedying the discrimination against these 12 employees, the Board took into account Manager Wright's testimony that in past seasons employees refusing night work were the last hired and the first laid off (R. 26; 165).

II. Respondent, by means of its March 18 seniority list, deprived the returned strikers of their pre-strike seniority, and terminated the employment status of all the other unreplaced strikers for whom there was no work after the strike. The record establishes that respondent's motivation for this action was to punish the strikers because they chose to strike rather than to work. Accordingly, respondent's discrimination against these strikers not only infringed their right to engage in concerted activities for their mutual aid and protection, in violation of Section 8 (a) (1), but also constituted unlawful discouragement of union membership in violation of Section 8 (a) (3) of the Act.

The decision of this Court in *N. L. R. B. v. Potlatch Forests, Inc.*, 189 F. 2d 82, 86, does not justify such discrimination against strikers. *Potlatch* involved the institution of a superseniority policy during a strike while the employer was in the process of replacing strikers. In this case none of the strikers here involved had been replaced. Respondent had no need to replace the strikers here involved because a large number of employees did not join the strike and because of a curtailment of operations which occurred simultaneously with the strike. In sum, the economic justification asserted for the institution of the discriminatory superseniority policy in *Potlatch*—the need to replace strikers in order “to carry on the business”—thus did not exist in the instant case. Furthermore, unlike *Potlatch*, respondent here did not invoke its new seniority policy until after the strike had ended, and, as stated above, its purpose

in doing so was to punish them for striking. In these circumstances, such discrimination, "after the strike, when there is no necessity for such action to keep [the] plant in operation," was clearly violative of Section 8 (a) (3) and (1) of the Act. *Olin Mathieson Chemical Corp. v. N. L. R. B.*, 232 F. 2d 158, 161 (C. A. 4), affirmed 353 U. S. 1020.

ARGUMENT

I. The Board properly rejected respondent's contention that the certification was invalid

A. Preliminary statement

Respondent's admitted refusal to bargain with the Union narrows the bargaining issue to the validity of the certification and more specifically to the finality of the Regional Director's rulings in the representation proceeding with respect to the eligibility of voters and the procedure for counting ballots. As previously noted, p. 8, the consent election agreement between the parties made the Regional Director's determination "final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election." Under settled law "Determinations by a Regional Director acting pursuant to a consent election agreement which specifies that such determinations will be final and binding can be set aside only where they are arbitrary or capricious" (*N. L. R. B. v. Carlton Wood Products*, 201 F. 2d 863, 866 (C. A. 9)).¹²

¹² See also, *N. L. R. B. v. Standard Transformer Co.*, 202 F. 2d 846, 848-849 (C. A. 6); *N. L. R. B. v. General Armature*

Respondent does not, and could not, claim that there was anything arbitrary or capricious in the procedure followed by the Regional Director in ruling on the challenged ballots. The Regional Director not only conducted an administrative investigation but also afforded respondent full opportunity to submit evidence at a formal hearing and to amplify its position in a brief (*supra*, pp. 9-11). Respondent's attack goes solely to the merits and consists of an assertion that there is no probative evidence to support the Regional Director's determination that the 12 employees who declined night work were eligible voters.

B. Respondent has failed to show that the Regional Director was arbitrary in permitting the 12 strikers who declined night work to vote

As noted above, respondent contended that the 12 strikers who declined night work thereby quit their jobs and were therefore ineligible to vote under the terms of the consent election agreement. The agreement, it will be recalled, defined those eligible to vote as including not only the unusually small number of employees on the payroll but also "all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or have been discharged for cause" (*supra*, p. 8). The 12 employees at issue were all listed on the 1953 seniority list and respondent conceded that they had not been replaced or discharged (*supra*, pp. 9, 11). They were therefore clearly eligible to vote unless, as re-

Co., 192 F. 2d 316, 317 (C. A. 3), certiorari denied, 343 U. S. 957; *Semi-Steel Casting Co. v. N. L. R. B.*, 160 F. 2d 388, 391 (C. A. 8), certiorari denied, 332 U. S. 758.

spondent contended, they had quit their employment by their refusal of night work after the strike.

Apart from the bare fact of this refusal, the record contains no affirmative evidence that the employees said or did anything which would indicate an intention to abandon their employment status.¹³ All 12 had been on the day shift prior to the strike and had expressed a desire to continue in that employment by applying for reinstatement (*supra*, pp. 9, 10). Although they turned down the night shift for personal reasons, none of them ever declined a post-strike offer of work on the day shift. Indeed, some of them coupled their rejection of night work with a request for day work (*supra*, p. 10).

Moreover, it was respondent's prior practice to permit daytime employees to decline night shift work without loss of their status as employees (*supra*, p. 10). General Manager Wright testified that in past seasons daytime employees who did not accept such assignments were the last hired and the first to be laid off, but admitted that this meant only relative position on the seniority list and not employees status as such (R. 17; 165). The record also shows that in previous seasons applicants for

¹³ Contrary to respondent's assertion, the circumstance that the two employees who declined night work because of illness had not obtained a leave of absence, does not establish an intention to quit on their part. Since they were laid off with no real expectancy of being recalled until the following season, they may well have considered sick leave unnecessary. While the omission might have justified respondent in discharging them, respondent does not claim to have done so.

employment who had expressed an unwillingness to work nights on their application blanks, were nevertheless considered for and given work on the day shift (*supra*, p. 10). Consequently, the employees had no cause to believe that respondent would regard their rejection of night work as a resignation.

The foregoing evidence furnishes a reasonable basis, we submit, for the Regional Director's determination that the 12 employees had not voluntarily quit. While their refusal to accept night work might have furnished grounds for discharge, respondent does not contend that it terminated their employment.

Respondent's claim that the Regional Director's action was arbitrary and capricious rests on various grounds. First respondent asserts that only four of the 12 employees testified at the hearing and that consequently there is an inadequate basis for the Regional Director's determination that the others had not quit their jobs. However, the fact that the employees did not testify is in no way attributable to the Regional Director. The hearing was held at respondent's request to permit it to adduce evidence that the employees had quit and therefore should not have been permitted to vote. If the testimony of these employees would have supported respondent's position, respondent had the opportunity and the burden of producing them as witnesses. The assertion in the hearing on objections that the 12 employees had quit was in the nature of "an affirmative defense" and hence was "in no sense a part of the Board's case". *N. L. R. B. v. J. G. Boswell*, 136 F. 2d 585, 597 (C. A. 9). See also *N. L. R. B. v. Cambria Clay*

Products Co., 215 F. 2d 48, 56 (C. A. 6); *Stewart Die Casting Corp. v. N. L. R. B.*, 114 F. 2d 849, 856 (C. A. 7), certiorari denied, 312 U. S. 680. Under all the circumstances, and particularly in view of respondent's failure to sustain its burden of proving that the 12 employees, by refusing night work, intended to quit, the Regional Director's determination manifestly cannot be said to be arbitrary.

Before the Board respondent also asserted that three of the employees did not apply for work during the following season,¹⁴ and urged that this showed that these employees intended to quit when they refused night work. However, this failure to apply did not occur until several months after the hearing on the challenged ballots and hence can have no bearing on the question here, which is whether the Regional Director's appraisal of the record before him was arbitrary or capricious.

And, finally, respondent points to the fact that some of the employees had worked nights in previous seasons or had indicated on their applications that night work would be acceptable. But this factor alone did not compel the Regional Director to infer that in refusing such work in January 1954, they quit. As the Trial Examiner observed (R. 48-49), "circumstances change with the times and in January 1954, they may have been confronted with a situation of personal convenience entirely different" from that of previous

¹⁴ Although respondent placed the number at five, two of the names specified by it—Virginia Luna and Celia Vasquez—are not included among the 12 employees whose ballots were challenged (R. 200).

seasons. In any event, "proof that the Regional Director's determination had been 'erroneous' or 'incorrect' would not demonstrate arbitrary action" (*Elm City Broadcasting Corp. v. N. L. R. B.*, 228 F. 2d 483, 485-486 (C. A. 2)). For "a mistake of honest judgment does not constitute an arbitrary or capricious decision" (*N. L. R. B. v. Volney Felt Mills*, 210 F. 2d 559, 560 (C. A. 6)).¹⁵

C. Respondent has failed to show that the Regional Director was arbitrary in permitting the challenged ballots to be opened in its absence

As detailed at pp. 12-13, *supra*, despite adequate notice to the parties that a meeting for the opening of the challenged ballots would be held in the Board's Regional Office at 2:00 p. m., October 19, 1954, respondent's counsel did not appear until shortly after 2:30 p. m., and respondent's general manager, although present on time, nevertheless did not identify himself to the receptionist or indicate his desire to attend the meeting as respondent's representative (*supra*, p. 13). Respondent's absence during the count was therefore attributable to its own neglect and not to any arbitrary action on the part of the Regional Director. Moreover, the Board's agent made a reasonable effort to give respondent fair play. He delayed the counting of the ballots until 2:15 p. m. and gave respondent's counsel, when he did arrive,

¹⁵ Indeed, the rule laid down by the Supreme Court with respect to a contractual arrangement indistinguishable from the consent election agreement here, is that the decision of a department head on a question of fact, made "final and conclusive" by a government contract, may be set aside on judicial review only on proof of fraud. *U. S. v. Wunderlich*, 343 U. S. 98.

an opportunity to examine the ballots as well as the tallies (*supra*, p. 13). Neither then nor before the Board did respondent dispute the fact that the count was accurate and *bona fide* (R. 297). In this setting, we submit, it can hardly be said that any prejudice resulted to respondent from its self-imposed absence. The demands of due process "are not technical, nor is any particular form of procedure necessary" (*Inland Empire District Council v. Millis*, 325 U. S. 697, 710). "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests" *Fay v. Douds*, 172 F. 2d 720, 725 (C. A. 2). *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350-351.

The Board properly concluded, therefore, that the Regional Director did not act arbitrarily or capriciously in certifying the Union. Respondent's unjustified refusal to bargain was accordingly violative of Section 8 (a) (5) and (1) of the Act.

II. Substantial evidence supports the Board's finding that respondent, in violation of Section 8 (a) (3) and (1) of the Act, reduced or abolished the seniority of unreplaced economic strikers after the strike as a penalty for striking

The statutory protection vouchsafed by the Act to employees who engage in peaceful strikes over terms and conditions of employment is not open to question. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union, U. A. W. v. O'Brien*, 339 U. S. 454, 457; *Amalgamated Association v. W. E. R. B.*, 340 U. S. 383, 389, 404; *N. L.*

R. B. v. International Rice Milling Co., 341 U. S. 665, 672, n. 6. By Section 2 (3) of the Act it preserved to such strikers their status as employees, and by Section 7 it declared that employees "shall have the right" to engage in "concerted activities" for "mutual aid or protection." *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 33, 344-345. To implement this right, Congress, in Section 8 (a) (1), forbade abridgement by an employer of the rights guaranteed by Section 7; and in Section 8 (a) (3) it forbade discrimination in employment to "discourage participation in union activities as well as to discourage adhesion to union membership." *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 29-42.¹⁶ The protection of Section 8 (a) (3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 218.

It can scarcely be denied that respondent's March 18, 1954, seniority list discriminated against those employees who had joined in the strike, and that a necessary consequence of such disparate treatment,

¹⁶ Special legislative solicitude for the right to strike was again expressed in Section 13, which states that "Nothing in this Act, except as specifically provided for herein, shall be construed so as * * * to interfere with or impede or diminish in any way the right to strike * * *." *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665, 673; *Mastro Plastic Corp. v. N. L. R. B.*, 350 U. S. 270, 284.

based solely on participation in concerted activity which the Act protects, would be to discourage resort to strike action in the future. *Gaynor News Co., Inc. v. N. L. R. B.*, 347 U. S. 17, 46. As set forth above, more than three months after the strike was over respondent revised its seniority list to give the non-strikers and replacements priority over those strikers who had been reinstated, treating the latter as new employees hired for the first time after the strike. In addition, respondent excluded from the revised list all previously listed strikers who had not been called back after the strike, *supra*, p. 5. But since these strikers had not been replaced, their status was that of laid off employees who would have retained their seniority listing under respondent's normal employment procedures (*supra*, pp. 3-4).¹⁷

As to the nonreinstated strikers, respondent, by eliminating them from the seniority list altogether, terminated their employment status—in other words, discharged them. Such a discharge of unreplaced strikers for having gone out on strike, was unquestionably violative of Section 8 (a) (1) and (3) of the Act. As this Court has repeatedly held, “the discharge of economic strikers prior, as here, to the time their places are filled constitutes an unfair labor practice”. *N. L. R. B. v. Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C. A. 9); *N. L. R. B. v. Buzza-*

¹⁷ There is no issue here as to the five or more strikers who were replaced during the strike. Their right to reinstatement terminated when they were replaced (R. 25, 64-65). *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346.

Cardozo, 205 F. 2d 889, 890 (C. A. 9), certiorari denied, 346 U. S. 923; *N. L. R. B. v. Cowles Publishing Co.*, 214 F. 2d 708, 710-711 (C. A. 9), certiorari denied, 348 U. S. 876; *N. L. R. B. v. McCatron*, 216 F. 2d 212, 204-215 (C. A. 9), certiorari denied, 348 U. S. 943.

Respondent's treatment of the returned strikers was no less unlawfully discriminatory. By taking these unreplaced strikers back and three months later according them seniority only from the date of their return to work after the strike, respondent was in effect discharging them and rehiring them as new employees. And having been deprived of all prior seniority because of their participation in the strike, the returned strikers inevitably stood to suffer future loss of employment because, under respondent's normal procedures, seniority governed the order of layoffs and recalls in respondent's fluctuating seasonal operations (*supra*, pp. 3-4). Respondent's action with respect to the returned strikers thus was equally violative of their statutory right to engage in concerted activity for their mutual aid and protection, free from employer discrimination on this account.

Before the Board respondent sought to justify its discrimination against the strikers on the basis of this Court's decision in *N. L. R. B. v. Potlatch Forests, Inc.*, 189 F. 2d 82. In that case, however, this Court rejected the view that "the true purpose motivating *Potlatch's* adoption of the strike seniority policy was a desire to penalize those members of the Union who had most persistently asserted the Union's

demands" (189 F. 2d, at 86). The Court held that "Potlatch exhibited no anti-union prejudices * * *" and that its action was "consistent with the legitimate exercise of the employer's 'right to protect and continue his business by supplying places left vacant by strikers'" (*id.* at 85-86). As shown below, we believe that the Board's finding in the instant case, that respondent's "purpose in reducing the seniority of the strikers was to punish them because they chose to strike rather than work" (R. 19-23), is supported by substantial evidence. Accordingly, the Board's decision here is not in conflict with that of this Court in *Potlatch*. Rather it parallels the decision of the Fourth Circuit, affirmed by the Supreme Court, in *Olin Mathieson Chemical Corp. v. N. L. R. B.*, 232 F. 2d 158, affirmed 353 U. S. 1020. In the latter case the Courts upheld the Board's determination that the employer's institution, after the strike ended, of a seniority policy which discriminated against the strikers was motivated by a purpose to penalize the strikers, and was therefore in violation of Section 8 (a) (3) and (1) of the Act.

The *Potlatch* decision rests on the holding of the Supreme Court in *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346, that an employer may "replace the striking employees with others in an effort to carry on the business" during the strike, even though such measures might tend to inhibit the striking employees in the exercise of their statutory rights. The Supreme Court stated (304 U. S. at 345-346):

* * * an employer, guilty of no act denounced by the statute, had [not] lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. [Footnote omitted.]

Thus under *Mackay* and *Potlatch*, it is established that an employer has a right to *replace* strikers, if necessary "to protect and continue his business." Neither case, however, supports the proposition that an employer may, without regard to legitimate business needs, adopt a policy of discriminating against economic strikers for the purpose of punishing them. Unlike *Potlatch*, this is precisely what respondent sought to do in the instant case. As the Board noted (R. 23, n. 6), 'Potlatch advocated 'strike seniority' before the strike was settled" and "adopted that policy at the time of settlement" (189 F. 2d at 86). In this case, as the Board found (R. 23), respondent did not change its seniority policy until after the strike and, as shown below, its purpose in reducing or abolishing the seniority of the strikers was to punish them for striking and not to continue its business. Thus, respondent did not prepare its new seniority list until after March 18, 1954, more than three

months after the end of the strike (*supra*, p. 5). The old 1952-53 seniority list remained posted after the strike and was used by respondent in recalling strikers during the balance of the 1953-54 season (*supra*, p. 7). Respondent did not advise any employee during the strike that strike seniority would be granted and did not mention any loss of seniority to those strikers offered reinstatement after the strike (*supra*, p. 6). Its personnel chief, who was most closely associated with carrying out respondent's seniority policy, was not apprised of the new policy until February 1954 (*supra*, p. 7). In view of these facts the Board was fully warranted in concluding that respondent did not adopt its new seniority until after the strike was over (R. 23).

While General Manager Wright testified that 'during the strike he told the employees who remained at work, and the few replacements who expressed concern over their job security, that they had become the "nucleus of our work force" and gave them "assurance that they would be maintained if and when the strike was terminated"' (*supra*, p. 6), the Board concluded that respondent merely intended to assure these employees that respondent would not yield to demands that they be discharged at the conclusion of the strike to make room for strikers (R. 21). That this was the extent of the "assurance" given these employees, and that respondent did not at this time intend thereby to give the nonstrikers super-seniority which would give them priority of employment in future seasons, is clearly indicated by General Manager Wright's testimony above quoted, as

to the nature of the "assurance" given. The Board's conclusion in this regard is confirmed by the facts detailed in the preceding paragraph respecting respondent's hiring practices during and after the strike.

As indicated above, the facts of this case are on all fours with those of the *Olin* case (232 F. 2d 158 (C. A. 4), affirmed, 353 U. S. 1020), holding that conduct closely analogous to that in the case at bar was violative of Section 8 (a) (3) and (1) of the Act.

As stated in the opinion of the Court, the question presented was whether "the Company violated Section 8 (a) (3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during the strike" (232 F. 2d at 159). The Court held that the Company in promulgating its superseniority policy, "after the strike, when there was no necessity for such action to keep its plan in operation," was "clearly penalizing the strikers for exercising their right to strike," and that such conduct was not sanctioned by the *Mackay* case (232 F. 2d, at 160-161).

Here, as in *Olin*, respondent did not adopt its superseniority policy until after the strike was over. This circumstance alone lends support to the Board's finding that respondent was "clearly penalizing the strikers for exercising their right to strike." The punitive purpose underlying respondent's new policy which was given concrete expression in the March 18 seniority list, is further demonstrated, moreover, by respondent's treatment of the strikers who were no

recalled after the strike. Instead of reducing their seniority, which might have been consistent with giving nonstrikers preferential tenure, respondent by excluding these strikers from the list altogether, in effect, discharged them, and thereby destroyed their preferential position over new applicants for employment in future seasons.¹⁸ Discrimination in favor of future applicants, as the Trial Examiner noted (R. 63-64), "could have had nothing to do with the successful prosecution of Respondent's business during the strike, and the Respondent did not claim that it did." The fact that this discrimination was without economic justification, as the Board stated (R. 19), is persuasive evidence of respondent's unlawful motivation in depriving the returned strikers of their pre-strike seniority. In addition, respondent's refusal to bargain on the grounds that the 12 strikers who refused night work were no longer employees—a position which is wholly inconsistent with respondent's own past practice—demonstrates respondent's hostility toward the Union and underscores the unlawful purpose behind respondent's action in reducing the strikers' seniority status. As the Board noted (R. 20), "Such clear and unwarranted violations of the Act cannot be ignored in assessing Respondent's motivation for an additional act of dis-

¹⁸ In hiring employees for the 1954-55 season, respondent followed the pre-strike seniority list after exhausting the March 8 list and before hiring persons not previously employed. The Trial Examiner found, however, that respondent did so because of the pendency of the instant unfair labor practice proceeding and not because it considered these employees entitled to any preferential status (R. 65; 291-292, 268-269).

to the nature of the "assurance" given. The Board's conclusion in this regard is confirmed by the facts detailed in the preceding paragraph respecting respondent's hiring practices during and after the strike.

As indicated above, the facts of this case are on all fours with those of the *Olin* case (232 F. 2d 158 (C. A. 4), affirmed, 353 U. S. 1020), holding that conduct closely analogous to that in the case at bar was violative of Section 8 (a) (3) and (1) of the Act.

As stated in the opinion of the Court, the question presented was whether "the Company violated Section 8 (a) (3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during the strike" (232 F. 2d at 159). The Court held that the Company in promulgating its superseniority policy, "after the strike, when there was no necessity for such action to keep its plant in operation," was "clearly penalizing the strikers for exercising their right to strike," and that such conduct was not sanctioned by the *Mackay* case (232 F. 2d, at 160-161).

Here, as in *Olin*, respondent did not adopt its superseniority policy until after the strike was over. This circumstance alone lends support to the Board's finding that respondent was "clearly penalizing the strikers for exercising their right to strike." The punitive purpose underlying respondent's new policy, which was given concrete expression in the March 18 seniority list, is further demonstrated, moreover, by respondent's treatment of the strikers who were not

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¹⁸ In hiring employees for the 1954-55 season, respondent followed the pre-strike seniority list after exhausting the March 18 list and before hiring persons not previously employed. The Trial Examiner found, however, that respondent did so because of the pendency of the instant unfair labor practice proceeding and not because it considered these employees entitled to any preferential status (R. 65; 291-292, 268-269).

crimination occurring exactly at the same time and by exactly the same means."

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

JEROME D. FENTON,
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Assistant General Counsel,

OWSLEY VOSE,
RUTH V. REEL,

Attorneys,
National Labor Relations Board.

MARCH 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the ex-

clusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representatives as the representative defined in section 9 (a) * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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No. 15727

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CALIFORNIA DATE GROWERS ASSOCIA-
TION,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED
FEB 18 1958

PAUL P. O'BRIEN, CLERK

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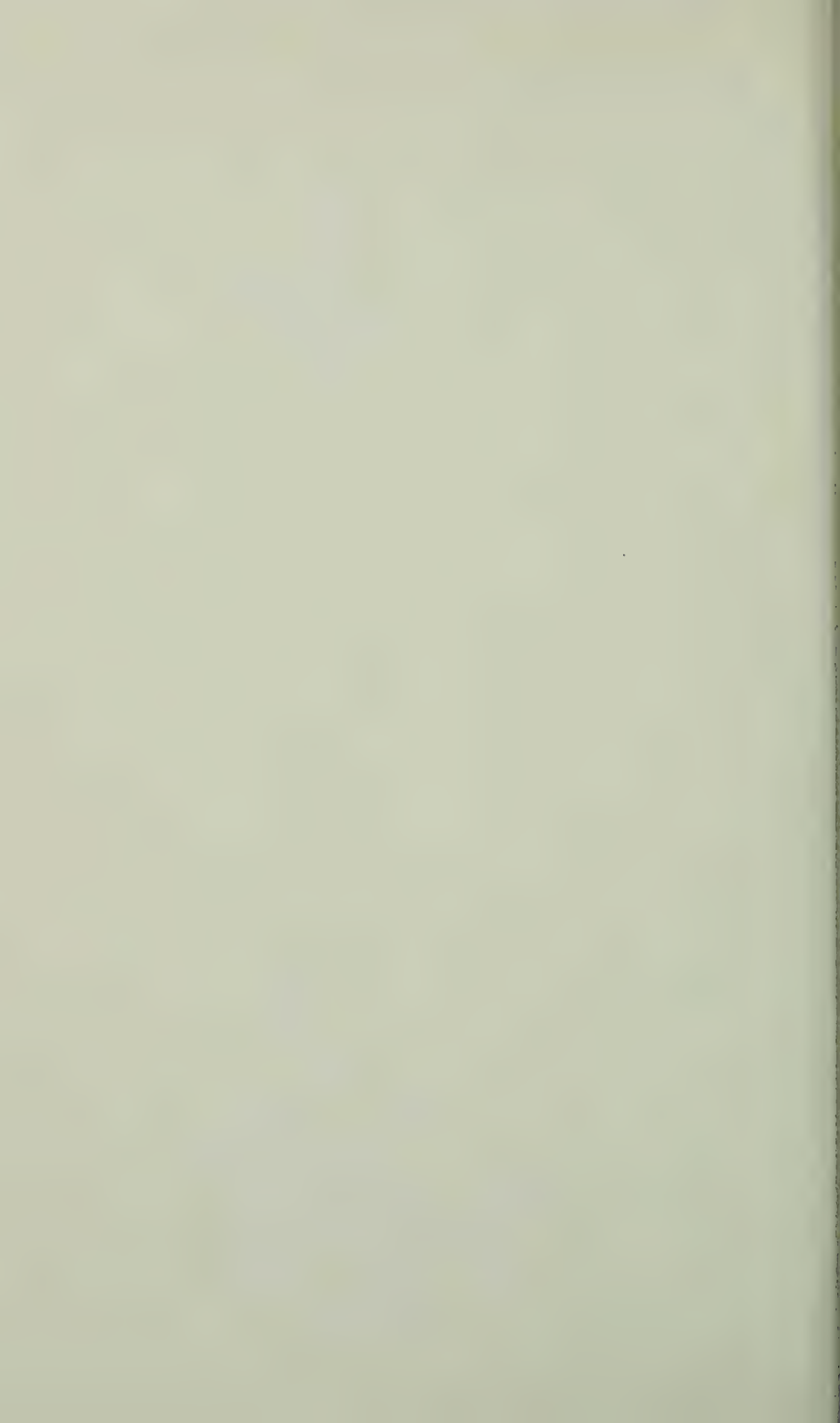
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GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America Before the National Labor
Board, Twenty-First Region

Case No. 21-CA-2130

CALIFORNIA DATE GROWERS ASSOCIA-
TION

and

UNITED PACKINGHOUSE WORKERS OF
AMERICA, CIO, LOCAL UNION #78

COMPLAINT

It having been charged by United Packinghouse Workers of America Local #78, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the Union, that California Date Growers Association, hereinafter referred to as the Respondent, has engaged in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act; the General Counsel of the National Labor Relations Board, by the Acting Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Respondent, California Date Growers Association, is a California corporation with a packing house in Indio, Riverside County, California, where

General Counsel's Exhibit No. 1-E—(Continued)
it is engaged in the business of processing and packaging dates and date products.

2. Respondent annually ships from its Indio, California, plant directly to points located outside the State of California dates and date products valued at in excess of \$50,000.

3. Respondent is and at all times material herein has been engaged in commerce within the meaning of the Act.

4. United Packinghouse Workers of America, Local #78, affiliated with the Congress of Industrial Organizations, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

5. A unit for the purposes of collective bargaining composed of all packing shed employees employed by the Respondent at its Indio, California, packing shed, excluding all office and clerical employees, and also excluding watchmen, guards, supervisors and professional employees as defined in the National Labor Relations Act, as amended, would insure the Respondent's employees the full benefit of the right to self-organization and otherwise effectuate the policies of the Act, and is, therefore, a unit appropriate for the purposes of collective bargaining.

6. On October 21, 1954, the Acting Regional Director certified that pursuant to the terms and provisions of an agreement for consent election in Case No. 21-RM-280 an election was held, a majority of valid ballots was cast for the Union and, pursuant to

General Counsel's Exhibit No. 1-E—(Continued)
Section 9 (a) of the Act, the Union is the exclusive representative of all the employees defined in paragraph 5 above for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

7. Respondent, while engaged in business as described above, on or about November 10, 1954, and at all times thereafter did refuse and fail and does now refuse and fail to bargain collectively in good faith with respect to rates of pay, wages, hours of work and other conditions of employment with the Union as the exclusive representative of all employees in the unit set forth in paragraph 5 above.

8. By the acts set forth in paragraph 7 above, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsection (5) of the Act.

9. Respondent's operations are seasonal beginning normally in August of each year and ending normally in May of the following year.

10. Since about 1945 Respondent has had a policy of recognizing seniority by classifications, employees retaining their seniority from one season to the next.

11. On December 27, 1951, the Union, under its previous name of United Fresh Fruit and Vegetable Workers Local Industrial Union #78, Congress of Industrial Organizations, was certified as representative of Respondent's employees pursuant to a consent election in Case No. 21-RC-2274.

General Counsel's Exhibit No. 1-E—(Continued)

12. On October 28, 1952, Respondent and the Union entered into a contract effective from July 1, 1952, to July 1, 1953.

13. The agreement of October 28, 1952, provided in part as follows:

“Section 1.

“Seniority shall be obtained for the purposes of this agreement, when the employee has been employed by the Association for a period of not less than twelve (12) weeks or fifty-one per cent (51%) of the season. Any and all seniority heretofore acquired by employees shall remain in full force and effect. All other employees employed by the Association shall be known as ‘temporary employees.’

“Seniority shall apply only to job classifications covered by this agreement.

“Section 2.

“In the event of layoffs or rehiring, seniority on a job classification basis shall be the determining factor.”

“Section 4.

“Association shall mail notices of each season's opening date to employees two (2) weeks prior to the beginning of each season and each such employee shall sign the Association's avail-

General Counsel's Exhibit No. 1-E—(Continued)
ability sheet or send a reply by mail within one
(1) week after the mailing of such notices, de-
claring his availability.

“Section 5.

“Whatever seniority an employee has is lost
if he

“(a) is not able to perform his usual duties.

“(b) is discharged for a just cause.

“(c) voluntarily leaves the employment of
the Association without a written leave of ab-
sence.

“(d) fails to give notice and report as re-
quired under this section.

“Section 6.

“The seniority of employees shall be on a job
classification basis.”

14. The seniority provisions set forth in para-
graph 13 hereof substantially define the seniority
policy of Respondent between 1945 and 1952.

15. The contract of October 28, 1952, expired,
following proper statutory notice on July 1, 1953,
and was not renewed or extended.

16. On December 1, 1953, following an impasse
in negotiations, the Union called a strike against
Respondent.

17. On December 8, 1953, the Union terminated
the strike.

General Counsel's Exhibit No. 1-E—(Continued)

18. During the strike Respondent continued to operate with non-strikers and some replacements.

19. On or about December 8, 1953, substantially all strikers applied unconditionally for reinstatement.

20. Until the close of operations in March, 1954, Respondent continued to observe the seniority policy described in paragraph 13 hereof.

21. In August, 1954, Respondent adopted a new seniority policy as follows:

(a) Non-strikers with seniority retained all seniority to their original hiring dates.

(b) Non-strikers ("temporary employees") without seniority were granted seniority based on their original hiring dates.

(c) Replacements were granted seniority based on their original hiring dates.

(d) Strikers who returned to work after December 8 were deprived of all accrued seniority and were assigned new seniority dates based on the date of their return to work after the strike.

(e) All other strikers were deprived of all seniority.

22. Respondent in its operations since August, 1954, has used the policy described in paragraph 21 hereof in rehires and layoffs.

General Counsel's Exhibit No. 1-E—(Continued)

23. By the acts set forth in paragraphs 21 and 22 hereof, Respondent has discriminated against striking employees because they engaged in protected concerted activities and to discourage membership in the Union, and has thereby engaged in and is thereby engaging in unfair labor practices within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act.

24. By the acts set forth in paragraphs 7, 21 and 22 hereof, Respondent has interfered with, coerced and restrained, and is interfering with, coercing and restraining its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and Respondent did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

25. The acts of Respondent set forth in paragraphs 7, 21 and 22 hereof, occurring in connection with the operations of Respondent described above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

26. The acts of Respondent set forth in paragraphs 7, 21 and 22 hereof constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1), (3) and (5), and Section 2, subsections (6) and (7) of the Act.

General Counsel's Exhibit No. 1-E—(Continued)

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-first Region, this 21st day of October, 1955, issues this Complaint against California Date Growers Association, Respondent herein.

/s/ GEORGE A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-first Region.

Admitted in evidence Jan. 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 1-V

[Title of Board and Cause.]

FIRST AMENDED ANSWER

Comes now California Date Growers Association, the Respondent, by and through its attorneys, Best, Best & Krieger, by John D. Babbage, and for answer to the complaint heretofore filed in this cause, admits, denies and alleges as follows:

1. Respondent admits the allegations in paragraphs 1, 2, 3 and 4 of said complaint.

2. Respondent admits the allegations in paragraph 5 in said complaint, but alleges that all janitors were also excluded from the unit appropriate for the purpose of collective bargaining.

General Counsel's Exhibit No. I-V—(Continued)

3. Answering paragraph 6, Respondent admits that on October 21, 1954, the Acting Regional Director certified that pursuant to the terms and provisions of an agreement for consent election in Case No. 21-RM-280 an election was held and that said Acting Regional Director further certified that a majority of valid ballots was cast for the Union. Respondent denies generally and specifically that a majority of valid ballots was in fact cast for the Union and denies generally and specifically that the Union is the exclusive representative of all the employees defined in paragraph 5 of the complaint for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

4. Respondent denies the allegations in paragraphs 7 and 8 of said complaint.

5. Respondent admits the allegations in paragraph 9 of said complaint, insofar as said allegations allege that the Respondent's operations are seasonal; Respondent denies that the season normally begins in August and normally ends in May, and alleges the seasonal operations normally begin in September of each year and normally end in March of the following year.

6. Respondent denies the allegations of paragraph 10 of said complaint; Respondent alleges that prior to and since 1945 Respondent has used a priority list in filling available seasonal job openings.

General Counsel's Exhibit No. I-V—(Continued)

7. Respondent admits the allegations of paragraphs 11, 12 and 13 of said complaint.

8. Respondent denies the allegations of paragraph 14 of said complaint.

9. Respondent admits the allegations of paragraphs 15, 16, 17 and 18 of said complaint.

10. Respondent denies the allegations of paragraphs 19 and 20 of said complaint.

11. Respondent denies the allegations of paragraph 21 of said complaint; Respondent alleges that a list of employees was made prior to the beginning of the 1954-55 season to enable the Respondent to have employees available to operate Respondent's business during the critical seasonal period when it packs, ships and sells its product. Said list included in the order stated the following:

- (a) Employees who did not go out on strike.
- (b) Employees who returned to work during the strike.
- (c) Employees who were employed during the strike as replacements.
- (d) Employees who returned to work at the conclusion of the strike.

12. Respondent denies the allegations of paragraph 22 of said complaint; Respondent alleges that its operations are seasonal in nature; there is extreme heat at certain times of the year at Respondent's place of operations in the Coachella Valley

General Counsel's Exhibit No. I-V—(Continued)
and it is an area of limited population. These factors cause an annually high turnover of employees in Respondent's operations. All available qualified employees are hired at or near the beginning of each season's operations. Because of the high turnover of employees, neither the categories of employees set forth in paragraph 21 of the complaint on file herein, even if said categories were correct, nor the categories set forth in paragraph 21 of this answer are descriptive of the employees presently working for Respondent.

13. Respondent denies the allegations in paragraphs 23 and 24 in said complaint. Respondent alleges that it has done no acts, nor has Respondent intended to do any acts to discourage membership in the Union; that any and all of the acts of Respondent were done solely for legitimate business purposes.

14. Respondent denies the allegations of paragraph 25 of said complaint, but admits that the operations of Respondent have a substantial relationship to trade, traffic and commerce among the several States of the United States.

15. Respondent denies the allegations of paragraph 26 of said complaint.

BEST, BEST & KRIEGER,

By,

JOHN D. BABBAGE,

Attorneys for Employer.

General Counsel's Exhibit No. I-V—(Continued)
State of California,
County of Riverside—ss.

James F. Wright, being sworn, says: That he is the General Manager of the California Date Growers Association, a corporation, the above-named Respondent, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing First Amended Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

.....

Subscribed and sworn to before me this 10th day of January, 1956.

J. D. BABBAGE,
Notary Public in and for Said
County and State.

Admitted in evidence Jan. 1, 1956.

118 NLRB No. 29

Indio, Calif.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-2130

CALIFORNIA DATE GROWERS ASSOCIA-
TION

and

UNITED PACKINGHOUSE WORKERS OF
AMERICA, AFL-CIO, LOCAL UNION
No. 78¹

DECISION AND ORDER

On February 20, 1956, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not violated the Act in certain other respects. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs. The Respondent also filed a reply brief.²

¹Herein called the Union.

²The Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs, in our opinion, adequately present the issues and positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with our decision herein.

1. We find in agreement with the Trial Examiner that the Respondent on and after November 10, 1954, refused to recognize and bargain with the Union as the exclusive representative of its employees in the unit set forth in the consent election agreement of the parties and thereby violated Section 8 (a) (5) and (1) of the Act. The Respondent refused to bargain on the ground that the Regional Director acted arbitrarily and capriciously in deciding that the ballots of the 12 nonreplaced economic strikers who refused jobs on the night shift established in January, 1954, should nevertheless be counted toward the Union's certification of October 21, 1954, because under the facts of this case they retained their employee status. The Respondent also contended that the certification was not valid for the additional reason that the Regional Director permitted the challenged ballots to be opened and counted in the absence of the Respondent.

With respect to the Respondent's contention that the 12 laid off strikers who were on the day shift before the strike of December 1-8, 1953, lost their

employee status and were not entitled to vote in the election as a result of their rejection of assignment to the night shift, the Trial Examiner points out with ample support from the record that it was the Respondent's prior practice to permit daytime employees to decline night shift work without loss of their status as employees. Although there was testimony by Respondent's General Manager James F. Wright at the 1954 hearing on objections that in past seasons daytime employees who did not accept such assignments were the last hired and the first to be laid off, this means only that relative position on the seniority list but not employee status as such would be affected by an employee's refusal to transfer from the day shift.

As for the Respondent's contention concerning the impropriety of opening and counting challenged ballots in the absence of its representative, the record shows that despite adequate notice to the parties that the conference for that purpose would be held in the Board's Regional Office at 2:00 p.m., October 19, 1954, the Respondent's counsel did not appear until shortly after 2:30 p.m., and the Respondent's general manager, although present on time, nevertheless did not identify himself or indicate his desire to attend the conference as the Respondent's representative. As the Trial Examiner found, the counting of the ballots was delayed by the Board agent until 2:15 p.m. Moreover, when the Respondent's counsel did arrive, he was given an opportunity by the Board agent to examine the ballots as well as the tallies.

Accordingly we find, as did the Trial Examiner, that the Regional Director did not act arbitrarily or capriciously in certifying the Union with which the Respondent refused to bargain in violation of Section 8 (a) (5) and (1) of the Act.

2. We also agree with the Trial Examiner that Respondent's conduct in removing from its revised seniority list of March 18, 1954, the names of all striking employees who had not worked during the 1953-54 season, including the 12 employees who refused work on the night shift, constituted discrimination against these employees in violation of Sections 8 (a) (3) and (1) of the Act. Like the Trial Examiner, we find no merit in Respondent's argument that the 12 employees who refused to work on the night shift had thereby quit their employment. The record is clear that if these employees had been working instead of striking the Respondent would not have regarded their refusal to work the night as a quitting. Nor would the Respondent have denied preferential hiring status to other employees, who had worked during a prior season, but did not work during or since the strike but for their participation in the strike. As indicated above and in the Intermediate Report, the Respondent refused to bargain with the Union following its certification by the Regional Director in a new election after the unsuccessful strike of December 1-8, 1953. The Respondent's alleged reason for this refusal is that the Regional Director acted arbitrarily and capriciously in certifying the Union. The record, however, as the

Trial Examiner found, shows that the Regional Director acted most properly and reasonably in all respects. The Respondent's entirely unjustified refusal to bargain and its conduct in discriminating against the above employees, supported neither by economic nor other valid reasons, persuade us that it was motivated by a desire to avoid all bargaining with the Union and to punish those employees who had not returned to work during or since the strike.

3. We do not agree with the Trial Examiner that the evidence in this case is insufficient to establish the Respondent's unlawful motivation in reducing the seniority of striking employees below that of nonstrikers and replacements. While the Respondent contends that this action was necessary for economic reasons, the record shows that the new seniority policy was not announced until the Respondent published its hiring list of March 18, 1954, more than three months after the strike was ended. Contrary to the Trial Examiner, we regard this fact as a material distinction between the instant case and the *Potlatch* decision³ upon which the Respondent relies. Our view in this respect has recently been affirmed by the Supreme Court of the United States, affirming the decisions of the Board and the Court of Appeals for the Fourth Circuit.⁴ In determining

³*N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d 82 (C.A. 9).

⁴*Mathieson Chemical Corporation and/or Olin Mathieson Chemical Corporation*, 114 NLRB 486, enf'd F. 2d 158 (C.A. 4), affirmed Feb. 28, 1957 (Supreme Court No. 153).

Respondent's motivation for this action it is, we believe, particularly significant that the Respondent, as we have found in agreement with the Trial Examiner, unlawfully discriminated against other employees who had not worked during or since the strike by publishing this very same list. Its refusal to bargain in violation of Section 8 (a) (5) of the Act upon grounds totally lacking in merit is equally relevant. Such clear and unwarranted violations of the Act cannot be ignored in assessing Respondent's motivation for an additional act of discrimination, occurring exactly at the same time and by exactly the same means. Certainly, the violations of Sections (8) (a) (5), (3) and (1) of the Act, found by the Trial Examiner, conflict with his conclusion that there is "no evidence of anti-union bias on the part of this Respondent." It is true that the Respondent consented to an election when the strike was over and the Union sued for reinstatement. Consent to an election, however, does not establish Respondent's good faith when, as it had good reason to believe after the unsuccessful strike, the result might well have been adverse to the Union. Nor does the fact that Respondent was willing to reinstate some employees after the strike exonerate it from lesser acts of discrimination against them.

In support of its position that the seniority policy was adopted for economic reasons as a means of continuing its business during the strike, Respondent's general manager, James F. Wright, testified that when individual nonstrikers or replacements

expressed concern over their job security during the strike he told them they had become the “nucleus of our work force” and “gave them the assurance they would be maintained if and when the strike was terminated.” At no time, however, did Wright or any other representative of the Respondent inform any employee until the March 18, 1954, list was published that the actual seniority of the striking employees would be reduced below that of the non-strikers and replacements. Nor do we believe that such a commitment can reasonably be inferred from Wright’s general assurances to the latter employees that they would be “maintained” when the strike was terminated. Such employees, of course, are normally concerned with job continuity and would seek assurance that their services would not be terminated at the conclusion of the strike in the event a successful union sought their ouster. In our opinion, it was this type of assurance, and no more, that Wright offered them. If the Respondent chose to replace permanently the economic strikers with those employees who continued to work during the strike, the former employees to the extent that they were permanently replaced would under established law⁵ not be entitled to reinstatement to the detriment of their permanent replacements. This is not to say, however, that the Respondent after the strike was over could go further than that and reduce the seniority of the returning strikers, who had not been

⁵N.L.R.B. v. Mackay Radio and Telegraph Company, 304 U.S. 333.

replaced, to punish them because they had engaged in protected concerted activity.

The General Counsel points out, as Wright conceded in his testimony, that he did not mention a word about loss of seniority to those strikers who were offered reinstatement after the strike. Respondent's purpose in remaining silent about so crucial a matter was, according to Wright's testimony, a desire not "to agitate that situation at the time they return" because, as he expressed it, "You are interested in business continuing." The foregoing tends to establish the fact that no super-seniority policy was initiated by the Respondent until after the strike had terminated, because it is evident from the testimony that the Respondent did not want to "agitate the situation" and that it was "interested in business continuing," and, moreover, the record is devoid of any evidence indicating that the Respondent found it necessary to promise super-seniority to its employees in order to continue operations. In these circumstances, for the Respondent to have made such a promise of superseniority during the strike would not only have tended to "agitate the situation" but it might well have tended to prolong the strike and thus greatly hamper the continuation of the Respondent's business. Moreover, the General Counsel points to further evidence that no such policy was formulated or adopted by the Respondent until long after the strike was over. Thus, Florence E. Hawkins, Respondent's personnel chief most closely associated with carrying out the

Respondent's seniority policy, was not apprised of the new policy until February, 1954. Hawkins, herself, admitted that in January, 1954, in response to one striker's (Kathryn White) inquiry concerning her seniority status, she (Hawkins) "did not know" and "couldn't tell her (White) a thing about it." Moreover, the old prestrike 1952-1953 seniority list remained posted after the strike and was used by the Respondent in recalling strikers during the balance of the 1953-54 season. The revised seniority list of March 18, 1954, was itself not prepared until virtually the close of the 1953-1954 season.

On the basis of the foregoing we find, contrary to the Trial Examiner, that the Respondent did not adopt a new seniority policy until after the strike was over and that its purpose in reducing the seniority of the strikers was to punish them because they chose to strike rather than work. We find that the Respondent thereby violated Sections 8 (a) (3) and (1) of the Act.⁶

4. We agree with the Trial Examiner's finding that the aptitude tests, which was instituted on an experimental basis by the Respondent for the 1954-

⁶Mathieson Chemical Corporation and/or Olin Mathieson Chemical Corporation, *supra*.

In view of our decision herein, we find it unnecessary to and do not pass upon the applicability of the Board's decision in Potlatch Forests, Inc., 87 NLRB 1193, reversed by the Court of Appeals for the Ninth Circuit, *N.L.R.B. v. Potlatch Forests, Inc.*, *supra*, in which the employer's policy of superseniority for nonstrikers was advocated before the strike was

1955 season and administered by the California Bureau of Employment, were not discriminatorily applied against participants in the strike of December, 1953. The General Counsel in his exceptions contends that the Respondent's action in requiring strikers who had been deprived of their seniority to pass the tests as a condition of employment, while not constituting an independent violation, was merely additional evidence of discrimination with respect to seniority.

The record shows that all strikers reinstated during the 1953-1954 season were on the March 18, 1954, seniority list and that in common with nonstrikers and replacements appearing on the list they were not required to take the aptitude tests before going to work. A number of these employees, including an indeterminate number of strikers, were required to take the tests thereafter. The record shows, however, that none of these employees suffered a loss of employment as a consequence thereof. It also appears that some of the employees on the list were not required to take the tests at any time. In this connection the record does not show that the Employer treated strikers and nonstrikers on the list differ-

settled and adopted at the time of settlement. However, Member Murdock, with due deference to the Court of Appeals for the Ninth Circuit, disagrees with the Court's Potlatch holding and would in accordance with the Board's own Decision in that case find that the Respondent's superseniority policy was unlawful without regard to whether it was adopted during or after the strike.

ently by requiring that the former, but not the latter, take the test after going to work. All strikers not on the list were required to take the tests, a number of them before returning to work. Only employees not on the list were denied employment on the ground that they had failed the tests. While this evidence raises some suspicion as to the motivation of the Employer in adopting a policy of aptitude tests for some employees, but not others, at this time, we are of the opinion that the evidence is insufficient to warrant a conclusion that the difference in treatment accorded employees was unlawful discrimination motivated by employees' strike activity.

The Remedy

As we have found in agreement with the Trial Examiner that the Respondent refused to bargain with the Union which was properly certified as the representative of its employees in an appropriate unit, we shall order the Respondent to bargain with the Union.

As we have found that the Respondent engaged in unlawful discrimination by (1) reducing the seniority of all reinstated strikers, and (2) excluding from the March 18, 1954, seniority list the 12 nonreplaced strikers who refused employment on the January, 1954, night shift, and all other nonreplaced strikers who were not reinstated during the balance of the 1953-1954 season, we shall order restored to their prestrike seniority all nonreplaced

strikers who were on the prestrike 1952-1953 seniority list except the 12 employees declining the night shift assignment. In view of Manager Wright's testimony that in past seasons employees refusing night shift work were the last hired and the first to be laid off, we shall order that the 12 employees be given only reduced seniority and a place at the bottom of the March 18, 1954, seniority list.

We shall also order reinstatement on the basis of the restored seniority of the discriminatees. Although the Trial Examiner refused to recommend a back pay order at the request of the General Counsel on the ground that there was an absence of evidence of monetary losses incurred by employees as a result of the discrimination, we find merit in the General Counsel's contention that, as the Trial Examiner found, the record discloses that fluctuations normally occur during the Respondent's seasonal operations which involve layoffs and the recall of employees on the basis of seniority. Accordingly, we shall order back pay in those cases where seasonal hiring has been delayed, or seasonal layoffs have been accelerated, or where there has otherwise been a loss of employment as a result of the Respondent's seniority policy.

As we agree with the Trial Examiner that the Respondent has not discriminated against strikers by requiring aptitude tests, we shall not order the Respondent to cease and desist from continuing to require such tests.

In view of our findings concerning the Respondent's refusal to bargain, and particularly the Respondent's unlawful seniority policy, we find, contrary to the Trial Examiner, a potential threat of future violations and shall therefore include below a broad cease and desist order.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that California Date Growers Association, Indio, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Packinghouse Workers of America, AFL-CIO, Local Union No. 78, as the exclusive representative of all employees in the unit found in the Intermediate Report to be appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment.

(b) Discouraging membership in or activities on behalf of the above-named labor organization, or any other labor organization, by discriminatorily reducing the seniority of employees or entirely depriving them of seniority status, or in any like or related manner discriminating in regard to hire and tenure of employment, or any terms or conditions of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form and join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of employees in the unit described in the Intermediate Report with respect to their rates of pay, wages, hours of work, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Rescind forthwith its discriminatory seniority policy as represented by its March 18, 1954, seniority list;

(c) Restore to their prestrike seniority all non-replaced strikers who sought reinstatement at the end of the December 1-8, 1953, strike and were on the 1952-1953 seniority list, except the 12 employees

who refused work on the night shift of January, 1954. Restore the 12 employees to reduced seniority at the end of the March 18, 1954, seniority list;

(d) Offer to the discriminatees reinstatement on the basis of their restored seniority;

(e) Make whole the discriminatees whose seasonal hiring was delayed, or whose seasonal layoffs were accelerated, or who otherwise suffered loss of employment because of the Respondent's seniority policy;

(f) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this order;

(g) Post at its place of business in Indio, California, copies of the notice attached hereto and marked "Appendix."⁷ Copies of the notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places

⁷If this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(h) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated Washington, D. C., June 21, 1957.

.....,
BOYD LEEDOM,
Chairman;

.....,
ABE MURDOCK,
Member;

.....,
PHILIP RAY RODGERS,
Member;

.....,
STEPHEN S. BEAN,
Member;

[Seal]

NATIONAL LABOR
RELATIONSE BOARD.

Appendix

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively, upon request, with United Packinghouse Workers of America, AFL-CIO, Local Union No. 78, as the exclusive representative of employees in the appropriate unit with respect to grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The appropriate unit is:

All packing shed employees employed at the Indio, California, packing shed, excluding all office and clerical employees, and also excluding watchmen, guards, supervisors and professional employees as defined in the National Labor Relations Act.

We Will Not discourage membership in the above-named labor organization, or in any other labor organization by discriminating with respect to seniority or any term or condition of employment.

We Will Not, in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will rescind our discriminatory seniority policy, as represented by the March 18, 1954, seniority list.

We Will restore all nonreplaced strikers who applied for reinstatement at the end of the strike of December 1-8, 1953, except the 12 employees who refused assignment to the night shift of January, 1954, to their prestrike seniority as indicated on the 1952-1953 seniority list. We will restore these 12 employees to reduced seniority at the end of the March 18, 1954, seniority list.

We Will offer the discriminatees reinstatement on the basis of their restored seniority status.

We Will make the discriminatees whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become or remain members of the above-named or any other labor organization. We will not discriminate in regard to hire or tenure of employment against any employees because of membership in or activity on behalf of any such labor organization.

CALIFORNIA DATE GROW-
ERS ASSOCIATION,
(Employer.)

Dated

By,
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

ERRATUM

The Intermediate Report and Recommended Order in the subject case is corrected as follows:

The last sentence of footnote 16, pages 13, 14, is corrected to read:

Other cases, cited by the General Counsel, in which labor organizations have been found to have violated the Act by causing an employer to discriminate with respect to seniority, are

inapposite because of express limitations stated in Section 8 (b) (2) and the proviso of Section 8 (a) (3) of the Act. Minneapolis Star and Tribune Company, 109 NLRB 727; Pacific Intermountain Express Company, 107 NLRB 837.

Dated at San Francisco, California, this 28th of February, 1956.

/s/ WILLIAM E. SPENCER,
Trial Examiner.

[Title of Board and Cause.]

Before: William E. Spencer, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act (61 Stat. 136), herein called the Act, against the Respondent, California Date Growers Association, Indio, California, upon charges filed by the Union, United Packinghouse Workers of America, AFL-CIO, Local Union No. 78, and upon complaint and answer, was heard, upon due notice, in Riverside, California, on January 9, 10, 11, 12, 1956. The allegations of the complaint, denied by the answer, are, in substance, that in violation of Section 8 (a) (1) and (5) of the

Act, the Respondent on and after November 10, 1954, refused to bargain with the Union, the duly constituted representative of a majority of its employees in an appropriate unit, and in violation of Section 8 (a) (1) and (3), discriminated against certain of its employees by reducing their seniority or depriving them of seniority status for the reason that they had participated in a strike against the Respondent.

All parties were represented at the hearing, participated, and were afforded full opportunity to present and to meet material evidence and to engage in oral argument and to file briefs. There was oral argument at the close of the hearing and briefs have since been submitted by the General Counsel and the Respondent.

Upon consideration of the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

The admitted facts on commerce are:

The Respondent is a California corporation with a packing house in Indio, California, where it is engaged in the business of processing and packaging dates and date products. It annually ships from its Indio plant to points outside the State of California dates and date products of a value in excess of \$50,000.

On these facts it is admitted, and is found, that Respondent is engaged in commerce within the meaning of the Act to an extent to bring it within the Board's current formula for asserting jurisdiction.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of the Act, admitting to membership employees of the Respondent.

III. The Unfair Labor Practices

A. Prefatory Note

The Respondent's business of processing and packaging dates is seasonal. The season normally opens in late August or early September and closes in the spring of the following year. Total employment varies both during season and as between seasons. The seasonal peak is reached in late November or December, and at such times Respondent is normally able to employ all qualified persons seeking employment with it. Beginning operations are governed by the amount of dates carried over from the previous season and prevailing crop conditions. Normally, packers are the first to be called, and a single line of operations is started; at the seasonal peak there maybe three lines of operations and a night shift. Preliminary to starting operations, employees who had acquired seniority status the previous season are contacted by telephone; in 1952, notice of starting operations was mailed to persons

carried on Respondent's payroll the preceding season. Regardless of seniority status, applications are required at the start of the season in order to determine current availability for employment. Both before Respondent's 1952 contract with the Union and under it, employees who had acquired seniority status in one season were given preferential hiring status over new applicants for employment. In short, an employee who acquired seniority status in one season had a reasonable expectancy of employment in the next succeeding season. Seniority¹ traditionally and under the union contract was on a departmental basis.

B. Chronological and Other Findings of Fact

1. On December 27, 1951, the Union, under its previous name of United Fresh Fruit and Vegetable Workers Local Industrial Union 78, Congress of Industrial Organizations, was certified as representative of Respondent's employees in an appropriate unit,² pursuant to a consent election in Case No. 21-RC-2274.

¹Respondent used the term "priority" rather than "seniority" as descriptive of its system of recall outside the union contract. For the most part the terms are used interchangeably herein.

²The unit agreed upon, and found to be appropriate, was and is: All packing shed employees employed by the Respondent at its Indio, California, packing shed, excluding all office and clerical employees, and also excluding watchmen, guards, supervisors and professional employees as defined by the Act.

2. On October 28, 1952, Respondent and the Union entered into a contract effective from July 1, 1952, to July 1, 1953.

3. The agreement of October 28, 1952, provided in part as follows:

“Section 1:

“Seniority shall be obtained for the purposes of this agreement, when the employee has been employed by the Association for a period of not less than twelve (12) weeks or fifty-one per cent (51%) of the season. Any and all seniority heretofore acquired by employees shall remain in full force and effect. All other employees employed by the Association shall be known as ‘temporary employees.’

“Seniority shall apply only to job classifications covered by this agreement.

“Section 2:

“In the event of layoffs or rehiring, seniority on a job classification basis shall be the determining factor.

“Section 4:

“Association shall mail notices of each season’s opening date to employees two (2) weeks prior to the beginning of each season and each such employee shall sign the Association’s availability sheet or send a reply by mail within one

(1) week after the mailing of such notices, declaring his availability.

“Section 5:

“Whatever seniority an employee has is lost if he

“(a) is not able to perform his usual duties.

“(b) is discharged for a just cause.

“(c) voluntarily leaves the employment of the Association without a written leave of absence.

“(d) fails to give notice and report as required under this section.

“Section 6:

“The seniority of employees shall be on a job classification basis.”

4. The contract of October 28, 1952, expired on July 1, 1953, and was not renewed nor extended.

5. On December 1, 1953, following an impasse in negotiations, the Union called a strike against Respondent.

6. On December 8, 1953, the Union terminated the strike.

7. During the strike Respondent continued to operate with nonstrikers and some replacements.

8. On December 8, 1953, substantially all those who had been on strike signed an availability list

list amounting to an unconditional application for reinstatement.

9. On and/or after December 8, 1953, and during the 1953-1954 seasonal operations, a substantial number of former strikers were reinstated though not all of them for the reason that there were not job openings for all of them.

10. Strikers were reinstated in the order of their seniority as determined by seniority lists existing at the time of the strike and formulated pursuant to seniority provisions of the 1952-1953 contract. This is referred to herein as the 1952-1953 seniority list.

11. On or about January 18, 1954, Respondent started a new production line on its night shift, and in their order of seniority as set forth above, proffered these jobs to former strikers who had not as yet been reinstated.

12. 12 employees offered work on the night shift refused the offer for personal reasons.

13. On February 5, 1954, a consent election agreement between Respondent and the Union was approved by the Board's Regional Director, and on February 18, 1954, an election on the basis of the consent agreement was conducted by the Board's agents. Case No. 21-RM-280.

14. At the February 18 election, the Respondent challenged the right to vote of the 12 employees who had been offered, and who had refused, work on the night shift, on the grounds that the said refusals constituted a quitting of their employment.

15. On March 24, 1954, the Board's Regional Director having found that the challenged ballots could determine the election results, and having conducted an investigation of the Respondent's claim, overruled the Respondent and issued a direction that the challenged ballots be counted.

16. The Respondent having filed exceptions to the Regional Director's Report, the latter on April 22, 1954, directed a hearing on the challenges. This hearing was held on April 29, 1954.

17. On October 5, 1954, on consideration of the transcript of the April 29, 1954, proceedings, and briefs filed by Respondent and the Union, the Regional Director issued his supplemental report on challenges in which it was again directed that the challenged ballots in question be counted.

18. On October 19, 1954, a revised tally was made including the counting of the challenged ballots.

19. Following this revised tally, which showed a majority in favor of the Union, and on October 21, 1954, the Regional Director certified the Union as bargaining representative of employees in the appropriate unit as set forth in the Consent Election agreement.

20. The Respondent thereafter filed objections to conduct affecting results of the election and these objections were in effect overruled by the Regional Director by letter dated October 27, 1954.

21. By letter dated October 22, 1954, the Union requested a meeting with Respondent for purposes

of collective bargaining. A second letter dated November 2 reiterated the request. Representatives of the parties did meet on November 10, but it is clear that neither at this meeting nor at any subsequent time did the Respondent agree to recognize the Union's certification by the Board's Regional Director as binding on it or enter into collective bargaining with the Union as the certified representative of its employees.

22. At the hearing in the instant proceedings the Respondent admitted its refusal to recognize and bargain with the Union subsequent to its certification.

C. The Issues

(1) The Refusal to Bargain

On the basis of items 21 and 22 of the chronological findings above, it is found that on and after November 10, 1954, the Respondent has refused to recognize and bargain with the Union. Respondent's contention is that the 12 former strikers who were offered and, for personal reasons, refused jobs on the night shift, quite their employment and because of that quitting thereafter had no employee status justifying their participation, as voters, in the consent election of February 18, 1954, and that in directing that their ballots, challenged by Respondent,³ be opened and counted, the Regional Director

³There were other challenged ballots but they are not an issue here and I shall not further refer to them.

acted arbitrarily and capriciously.⁴ If Respondent is correct in this latter contention, the certification of the Union was invalid because except for a tally of the 12 challenged ballots the Union would not have received a majority of votes cast. If the certification was invalid the Respondent was under no duty to recognize and bargain with the Union.

The issue is not whether the Regional Director was right or wrong in determining that the twelve employees in question were eligible to vote. By the terms of the consent election agreement his decision was "final and binding." Having signed this agreement the Respondent, as a party to it, has no right to question the soundness of his judgment, as such, but, under the decisions, may show that in so deciding the Regional Director acted arbitrarily and capriciously.⁵ There are a number of ways in which this might be shown, such as a one-sided investigation, a refusal to permit the Respondent to present evidence supporting its position, or a decision based on no evidence of a probative character.

There was nothing arbitrary or capricious in the procedures followed by the Regional Director with respect to the challenged ballots. As to the election

⁴Actually, a Regional Director made the initial determination and an Acting Regional Director made the final determination. The matter being of no consequence, for convenience I shall refer to each as the Regional Director.

⁵Elm City Broadcasting Corporation, 111 NLRB 980, 981, and cases cited in footnote 3, p. 981, therein.

itself, all parties certified that it was fairly conducted. The Regional Director's initial determination that the challenged ballots should be counted, was based on an investigation in which representatives of the Respondent participated. The Respondent filed a memorandum with respect to its position in the matter. Thereafter, on receipt of the Regional Director's report on challenges, Respondent filed exceptions and requested a hearing. This request was granted. At the hearing, conducted by an attorney of the Regional Office, all parties were afforded full opportunity to submit evidence on their respective positions. The Respondent participated in this hearing, and thereafter filed a brief with the Regional Director. After an elapse of some six months, the Regional Director issued his supplemental report in which the ruling was again adverse to the Respondent. Thereafter, a conference was arranged for the opening and counting of the challenged ballots and a date and time was set, a postponement of the original date having been granted at Respondent's request.

Respondent complains that it was not actually present when the challenged ballots were opened and counted, and this is true. Respondent was not present because, though informed as to the date, the place and the time, Respondent's counsel did not appear on time and Respondent's general manager though present at the Board's offices where the ballots were opened and counted, did not identify himself in such manner that those responsible for han-

dling the ballots in question were aware that he was available. As a matter of fact, the counting of the ballots was delayed to allow for any ordinary tardiness on Respondent's part and proceeded only when it appeared that Respondent would not be present through its representatives. Obviously, there was nothing arbitrary or capricious here since it was Respondent's fault, and Respondent's alone, that it was not represented at the opening and counting of the challenged ballots, and, in any event, Respondent does not dispute the accuracy and bona fides of the count.

From the foregoing, it is clear that Respondent had a fair and full opportunity to present and amplify its position before the Regional Director before a final determination was made in the matter of the challenged ballots. It was not permitted to adduce any additional evidence in this proceeding because, obviously, the Regional Director could not have acted arbitrarily or capriciously on the basis of evidence that was not before him at the time he made his determination on the issue of the challenged ballots.

Turning now to the evidence upon which the Regional Director based his decision:

In the initial stage of his investigation affidavits were taken, and at the hearing granted at Respondent's request, the sworn testimony of Respondent's general manager, James F. Wright; plant, manager, Hillman Yowell, and personnel officer, Florence

Hawkins, as well as the testimony of several of the employees in question, was taken. From this testimony it appears that Respondent's operations normally opened with a day shift and then, as the work load increased, a night shift might be added; that at least the nucleus of the night shift was recruited from the day shift; that, on occasion, day shift workers would be given a choice of transferring to the night shift; that they were free to accept or refuse the transfer, and if they refused they were neither laid off nor discharged nor regarded as having quit their employment; that night shift work offered some advantages of advancement in job status and some priority in continuity of employment both as to the order of layoffs and order of recall in subsequent seasons. It is true that Wright testified that persons refusing night shift work were dropped from the "priority list" but in the context of his entire testimony and that of other witnesses, it is clear that being dropped from the "priority list" in the sense in which Wright used the term, did not mean the loss of employee status. He testified: "I wish to point out then * * * that a person who wasn't willing to work nights, wasn't willing to work shorter weeks, wasn't willing to work during the hot weather, that that person wasn't laid off or fired because of it but they were the last hired and the first to be laid off."

From what is virtually an undisputed state of facts, it seems clear that had the 12 strikers in question been at work on the day shift at the time Re-

spondent offered them night shift work, their rejection of that offer would not have caused their layoff or discharge and would not have been regarded by the Respondent as a quitting. They were not actually working on the day shift at the time they were offered night shift work because they had been on strike and had not yet been reinstated. Absent a showing that they had been replaced or that their jobs had been abolished—and there was none—they occupied the same employee status when they were offered and refused night shift work that was theirs when they went on strike, and it appears that all of them were day shift employees at that time. [Section 2 (3) of the Act.] Their application for reinstatement did not place them in the category of new applicants for employment; they had acquired seniority status as shown by their placement on the 1952-53 seniority list, and they did not lose that status when they went on strike. The Respondent, however, appears to have treated them as new applicants for employment, without choice in the matter of accepting work on a night shift. The issue here is not whether their order on the seniority—or priority—list was affected but whether their employee status was wiped out by their refusal. Like the Regional Director I am convinced that it was not. If they had employee status they were entitled to vote, because the consent election agreement provided that those eligible to vote were:

All packing shed employees employed by the Employer at its Indio, California, packing shed

during the last complete payroll period in January, 1954, and including all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or have been discharged for cause, and have not been rehired or reinstated prior to the date of the election.

As previously stated, the names of all 12 employees in question appeared on the 1953 seniority list.

There is no evidence that any of the employees in refusing night shift work intended to quit, or did in fact quit, other than evidence of their rejection of night shift work for personal reasons. Nor do I think a voluntary yielding of their employee status can reasonably be inferred. Though, as testified to by Respondent's witnesses, night shift work may have offered exceptional opportunities for advancement and preferment in continuity of employment, women employees for innumerable personal reasons, such as arranging for care of children, might choose to forego such opportunities and remain on their day-time jobs. The Respondent doubtless was well aware of this and, being aware of it, never made it mandatory for a day shift worker to transfer to a night shift. Nor does the fact that in previous seasons certain of these 12 employees had accepted night work, or had indicated on their applications that they would accept night work, provide a sufficient basis

for an inference that in refusing such work in January, 1954, they quit, because circumstances change with the times and in January, 1954, they may have been confronted with a situation of personal convenience entirely different from the occasions when they actually worked on a night shift or indicated on their applications that night shift work would be acceptable. In this connection, it is significant that in making out applications required of all employees regardless of status at the start of a season, it was not required that an employee express a willingness or lack of it to work on a night shift, though the application forms made provision for such a statement, and employees whose application forms indicated that night shift work was not acceptable, were not thereby prejudiced in the order of their hiring. In short, there is no showing that any employee with seniority status lost that status by indicating that night shift work was not acceptable.

All reasonable inferences to be drawn from the testimony is that the 12 employees in question, in refusing night shift work, did not intend to quit, and in view of past practices it may not be inferred that they would reasonably believe that their refusal would have the effect of relinquishing their employee status. That all 12 of these employees had actually applied for reinstatement following the termination of the strike, and that some of them inquired concerning availability of day shift work at the time they refused the night shift offer, reveals

a state of mind inconsistent with a voluntary surrender of employee status. And, of course, the Respondent may not make that a quitting which lacks the assent of the person involved, either actual or implied. A quitting necessarily implies voluntariness on the part of one who quits.

One other matter raised before the Regional Director in support of Respondent's position, was that two of the 12 employees whose votes were challenged gave illness as a reason for refusing the offer of work on a night shift. Neither had applied for a leave of absence. A leave of absence was normally required of an employee absenting himself from work because of illness. By their failure to apply for a leave of absence, the Respondent argues, they lost their status as employees. Obviously, a leave of absence is not required of employees who are participating in a strike, or are laid off. A leave of absence can only mean a leave of absence from a state of actual employment. The two employees in question had the status of employees at the time they received the offer of night shift work but were not then actually working. Their regular jobs had not been abolished but were not then operative and therefore their status was analogous to that of laid off employees. If they were free to accept or reject night shift work and chose to reject it, they remained in the status of laid off employees and there was no occasion for them to apply for a leave of absence. The Regional Director found, and I have concurred in his finding, that employees with ac-

quired seniority status were not normally considered to have relinquished their status as employees when and by refusing work on a night shift.

From the foregoing and upon the entire record, it seems clear and is found, that in his decision on the challenged ballots the Regional Director did not act arbitrarily or capriciously, or upon insufficient or insubstantial evidence. His certification of the Union was therefore valid and binding upon the Respondent. Accordingly, it is found that by its refusal on and after November 10, 1954, to recognize and bargain with the Union as exclusive representative of its employees in the unit set forth in the consent election agreement and herein found to be appropriate,⁶ the Respondent violated Section 8 (a) (1) and (5) of the Act.

(2) Discrimination With Respect to Seniority

Prior to its contract with the Union, Respondent maintained a priority list which governed the order of layoffs during seasonal operations and rehiring at the start of a new season. Under its contract with the Union executed October 28, 1952, and expiring July 1, 1953, it was bound by the seniority system of that contract as set forth in Item 3 of the Chronology above. The priority list maintained prior to the contract, and the seniority list under it, followed the same general principles in method and order of compilation. Following the expiration of the contract Respondent continued seniority ratings

⁶See footnote 2, *supra*.

as provided in the contract, at least up to the time of the December 1, 1953 strike. As previously stated, during the period of the strike from December 1 to December 8, the Respondent continued its operations with a working force composed of nonstrikers and a few replacements.⁷ This was an economic strike and under the rule of the Mackay Radio case⁸ the Respondent could lawfully hire new employees to fill the jobs of strikers. The General Counsel makes no issue of the five striking employees who were thus replaced.

Following the termination of the strike on December 8, and the unconditional offer to return to work made by the strikers on December 8, the Respondent reinstated all strikers for whom work was available and reinstated them in the order in which they appeared on the 1952-53 seniority list compiled under the Union contract. There is no contention made that any striking employee was denied reinstatement because of his or her union or concerted activities. Admittedly, however, all employees reinstated upon termination of the strike, were reduced in seniority below all employees who worked during the period of the strike. In short, while adhering to the old seniority list in the order of its reinstatement of striking employees, the Respondent in effect

⁷Actually, only five strikers were replaced during the strike.

⁸*N. L. R. B. vs. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 346.

adopted a new overall seniority policy upon termination of the strike, which had the necessary effect of penalizing strikers while rewarding nonstrikers, since thereafter, regardless of comparative seniority status at the time of and prior to the strike, all non-strikers were given seniority over all strikers. This new policy was given concrete expression in the compilation of a new seniortiy list dated March 18, 1954.

The reduction in seniority status was a matter of substance.⁹ Fluctuations occur during Respondent's seasonal operations which involve layoffs and such layoffs are normally made on the basis of seniority—or priority—lists; at the start of a new season, employees are recalled in the order of their seniority. Obviously, therefore, the continuity and duration of employment is governed, in large measure, by seniority status. Lacking such evidential factors, it would, in any event, be inferred that involuntary reduction of seniority is discriminatory,¹⁰ and this is true whether seniority follows contractual relationships or is unilaterally established by the employer. True, the Act does not confer seniority rights upon strikers, and such rights are usually

⁹“Seniority rights are basic conditions of employment * * *” *N. L. R. B. vs. Wheeling Pipe Line, Inc.*, decision of the U. S. Court of Appeals, Eighth Circuit, No. 15369, dated January 24, 1956; 37 LRRM 2403.

¹⁰*N. L. R. B. vs. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al.*, 347 U. S. 17.

derived from union contracts,¹¹ but where there exists a seniority system, whether that system derives from contractual relationships or the unilateral action of the employer, the Act prohibits a discriminatory application of it where such application discourages or encourages membership in a labor organization. Here, at all times material to the issue, whether or not it was called that, there existed a seniority system, and when at the conclusion of the strike it was changed to the detriment of the strikers who had been permanently replaced, discrimination occurred. It is not necessary that proof be adduced that such discrimination actually discouraged union and concerted activities. The inference is inescapable.¹²

Not all acts, however, which have the necessary effect of discrimination against those engaged in protected concerted activities, are unlawful under the Act. An economic striker may be permanently replaced and thus lose his job because of having engaged in a strike, and such action while necessarily

¹¹*N. L. R. B. vs. Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9).

¹²“Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.” *Gaynor News Company, Inc., et al., vs. N. L. R. B.*, 347 U. S. 17; 33 LRRM 2428.

and emphatically discouraging union activities, is lawful where it is consistent with, and because of the exercise of the employer's "right to protect and continue his business by supplying places left vacant by strikers." Mackay Radio, *supra*. Motive controls here because in this situation "the [employer's] true purpose is the object of investigation with full opportunity to show the facts." *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1. If the employer has the "right to protect and continue his business by supplying places left vacant by strikers," it would seem to follow that he has also the right to take such other action as he deems necessary "to protect and continue his business" in the face of an economic strike, providing his motive is, in fact, "to protect and continue his business," and not to retaliate against and punish his striking employees. Determining motive in a given situation frequently requires "a high degree of introspective perception"¹³, and this is true here where the discriminatory effect of the Respondent's action on seniority is apparent and substantial. There are certain objective factors present, however, which are invaluable in assessing motive.

Independent of the action with respect to seniority, there is no evidence of antiunion basis on the part of this Respondent. There is no evidence that this Respondent opposed the unionization of its employees, or was in any way hostile to it. Such elec-

¹³*N. L. R. B. vs. Donnelly Garment Co.*, 330 U. S. 219, 123.

tions as were held were held pursuant to consent agreements. It is true that negotiation of an agreement to supersede the contract expiring July 1, 1953, reached an impasse and presumably to break that impasse in its favor the Union called a strike, but no refusal to bargain is charged and no inference of antiunion sentiment can rest on this state of facts. It may be assumed that the Respondent did not like it when its employees struck, but when they applied for reinstatement it took them back as fast as it had work for them to perform. With respect to its action in reducing the seniority of reinstated strikers, we have the undisputed testimony of its general manager, James F. Wright, that this action was taken for the purpose of reassuring its non-striking employees and replacements concerning the continuity of their employment, and because it considered such action essential to safeguard and protect its economic interests in continuing to operate during the strike.¹⁴

¹⁴Excerpts from Wright's direct examination:

Q. Now, during the period that you were in operation, did you have conversations with the employees either directly or through representatives with respect to the status of the employees who remained and the status of employees who were employed and the status of employees who would come back to work?

A. Yes. I was in, you might say, constant touch with the employees during this period. In fact, I used to pick them up—quite a few of them up and escort them into work every morning, and was in contact not only with the employees who remained during the strike and those who were hired during

If there is something inherently false or specious in this position, I fail to discern it. The strike hit the Respondent when its seasonal operations were at their height since during the Christmas holidays Respondent's products are particularly in demand. It is not in the least incredible that nonstriking employees, and employees newly hired during the strike, would

the strike, and also the ones that returned to work during the strike.

* * *

Q. What did you do with respect to the [non-striking and newly hired] employees that I have described here?

A. Well, as would be natural under a trying situation, the employees would be concerned with their job security, and I assured them at the time that those who had remained through the strike, the replacements and the people who returned, that they would be—had become and would be treated as the nucleus of our work force; that we didn't know how long the strike would go on; that we intended to continue to operate the plant and receive and grade and pack and ship our dates, and that these people we felt were a necessary part of our business; and that I gave them the assurance they would be maintained if and when the strike was terminated.

* * *

Excerpt from Wright's cross-examination:

Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and wanted personal assurance that they would be taken care of after the strike, you gave it to them?

A. That's right.

Q. And that is about all it amounted to?

A. Well, you say that is about all. It was a pretty important thing for the people.

seek some assurance of preferred seniority status which would protect them from displacement by striking employees when and if the latter chose to return to their jobs, or that an employer would give such assurance if he felt it would bolster his economic situation. It is true that the Respondent did not call any of these employees to the witness stand to corroborate the testimony of its general manager,

Q. It is very important to a girl who had no seniority and was working during the strike and wondered what would happen to her job when seniority employees offered to come back. I understand that. But I want to know whether your publication of your determination to protect these people went any farther than individual assurances.

A. I believe, Mr. O'Brien, that I talked—well, I know that during the strike I would talk to the working force that was there every day, and this was one of the primary things these people were concerned about, so I am sure they were advised of it in meetings of all the people who were at the plant. As I recall, I met—I had met with the graders and the people in that area of the plant in one meeting, and met with the packers and the people in the pitting department in that area of the plant at another meeting, but that was a daily occasion during the strike.

Q. That was to encourage them to get out production, let them know you were with them, is that it?

A. Well, it covered a lot of things.

Trial Examiner: Mr. Wright, do you have any distinct recollection whether, during any of these meetings that you had with the employees during the strike, whether you specifically mentioned the matter of their security to them? Do you have a recollection of it?

The Witness: Yes, I do.

but neither did the General Counsel call any witness to refute it. I observed nothing in the demeanor of the witness which would lead me to discredit him. To the contrary, I was favorably impressed with his forthrightness and his co-operative attitude throughout the hearing.

There are factors, relied on by the General Counsel in his brief, to counter this testimony. The old seniority list, posted in the plant, was not removed, it appears, nor was a new one, conforming to Respondent's revised policy, posted. It is remembered, however, that the old seniority list was not entirely discarded: it was still followed as to the order of reinstating the strikers. The union contract having expired, there was no requirement that the Respondent post its revised list or any list at all. There is also some question as to just when a revised seniority list, dated March 18, 1954, was first prepared, but this does not seem very significant inasmuch as it had little, if any, utility until the beginning of a new season.

Further, it appears that Wright issued no instructions to Florence Hawkins, Respondent's personnel clerk, at a time when, according to Wright, the new seniority policy was instituted, and at the time strikers were reinstated they were not told that their seniority had been reduced. Presumably, the General Counsel would have it inferred from such factors that the reduction in seniority of reinstated strikers, had not actually been determined at the time the strike was concluded and therefore could

not have had as its moving cause the protection and continuance of Respondent's business during the period of the strike. In the face of Wright's positive and uncontested testimony to the contrary, I think such an inference is not justified. With a single exception, there is no showing that strikers on reinstatement inquired concerning seniority status and there is no showing of a deliberate withholding of information; nor was there any advice given them contrary to the position Respondent now asserts. It may well be that Respondent was not impelled to volunteer information which would be adverse to the reinstated striker's interests, until some occasion arose requiring the application of a new policy.¹⁵ Nor does it appear that the situation was such that once the revised seniority policy had been determined, notice of it would necessarily be chan-

¹⁵Excerpt from Wright's testimony on cross-examination:

Q. Are you pretty sure that you did not tell any of the returned strikers that they had lost seniority by reason of the fact that some people had continued to work during the strike and they had not?

A. I didn't personally. One of the problems after a strike when you have people come back, you have the problem of trying to rebuild a co-ordination between some people who are out and some people that were in, and it isn't too good business policy to agitate that situation at the time they return. You are interested in business continuing.

Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and wanted personal assurance that they would be taken care of after the strike, you gave it to them?

A. That's right.

neled immediately to the personnel clerk. It was Wright's undisputed testimony that his supervisory staff was advised concerning the new policy during the period of the strike and the General Counsel apparently accepted this testimony inasmuch as no evidence was offered to refute it. Assuming, however as apparently the General Counsel would have it found, that no definite formula for a revised seniority policy had been determined until after the strike, such delay would have little significance if, as Wright testified, assurances had been given to nonstrikers, during the strike, concerning the continuity of their employment. It is sufficient that the action, when taken, was consistent with such assurances.

Upon the evidence afforded me, I can only conclude that the General Counsel has not proved unlawful motive in a situation where motive is controlling. I am unable, in fact, to distinguish the situation here from the seniority displacement of economic strikers which the court found lawful in *Potlatch Forests, Inc.*, *supra*. That decision stands squarely for the proposition that an employer may advance the seniority of nonstrikers to the detriment of economic strikers where the action is consistent with, and for the purpose of protecting and continuing his business during the strike. While in the *Potlatch* decision the court refers to those whose seniority was advanced as "replacements," it appears that this term as employed by the court included strikers who returned to their jobs before

the strike was ended. I do not perceive a valid distinction between such employees and employees who, as here, never went on strike. Neither were actually "replacements" as that term was employed in the Mackay Radio case. Nor do I think the fact that in the Potlatch case the employer announced his new seniority policy before the strike was ended, it is a material distinction. In fact, the case at bar is stronger on its facts because in the Potlatch case it appears that the employer had given no assurances to his nonstriking employees that "their places might be permanent," whereas the uncontested evidence here is that such assurances were given.

I do not of course undertake to assess the merits or demerits of the Potlatch decision. It is the law—at least in the Ninth Circuit. The Board did not seek certiorari and in my opinion it has not been overruled in any material respect by the Supreme Court in Radio Officers and related cases, *supra*. If the Board does not intend to follow the court in Potlatch, it is for the Board and not the Trial Examiner to voice its dissent, and until it does so, I consider myself bound by the court's decision.¹⁶ Ac-

¹⁶Mathieson Chemical Corporation, et al., 114 NLRB No. 85, cited by the General Counsel, is distinguishable, because in that decision the Board said:

It is highly significant that not until the strike was over, and all the strikers had been put back to work, did the Respondent for the first time decide to separate its employees into two seniority groups for layoff purposes, depending on whether or not they had returned to

cordingly it is found that the Respondent did not violate the Act when, for economic reasons, it gave nonstriking employees and replacements seniority over striking employees.

In certain respects, however, the Respondent went beyond its stated objectives in advancing the seniority of its nonstriking employees and replacements, and in so doing it went outside the purview of the Potlatch and Mackay decisions.

First, with respect to the 12 female employees who went on strike and were thereafter offered reinstatement on a night shift which they refused. The Respondent, taking the position that by the said refusals they quit their employment dropped them from its seniority list altogether. Accordingly, their names do not appear on the March 18, 1954, list. Such action could have had nothing to do with

work before the end of the strike. The Respondent does not claim and there is no suggestion in the record that, as an economic measure to get employees to work during the strike, it had promised them super-seniority. In fact, it does not appear that the matter of relative seniority was ever mentioned to any employees before the end of the strike.

Other cases, cited by the General Counsel, in which labor organizations have been found to have violated the Act by causing the employer to discriminate with respect to seniority, are inapposite for the simple reason that any action by a labor organization which causes an employer to discriminate is unlawful unless covered by the proviso to Section 8(a)(3) of the Act, and discrimination with respect to seniority is not covered by that proviso.

the successful prosecution of Respondent's business during the strike, and the Respondent does not contend that it did. Such action was discriminatory if in fact the strikers had maintained their status as employees, and they had maintained that status by virtue of Section 2(3) of the Act because they had not been permanently replaced nor had their jobs been abolished. Because of seasonal curtailment or curtailment due to strike, there was not then work for them on the day shift but there is no showing that their day shift jobs had been abolished. As previously found, the action was discriminatory because customarily and normally day shift workers were not required to accept night shift work in order to maintain employee status. Such action resulting in destroying their seniority status altogether, had the necessary effect of discouraging union affiliation, and, being without the justification which made Respondent's revised seniority policy valid in other respects, was unlawful. It is in such a situation that the common law rule that a person is held to intend the foreseeable consequences of his conduct, finds its proper application.¹⁷

Also excluded from Respondent's March 18, 1954, seniority list, were all striking employees who were not actually reinstated during the 1953-54 season. They, too—with the exception of those who were replaced during the strike, and there is no issue concerning them—had continuing employee status,

¹⁷See *Intermountain Equipment Co.*, 114 NLRB No. 214.

not having been replaced and their jobs not having been abolished. Preferential status because of having worked during a prior season was recognized both under the union contract and prior to it. These employees were not, as Respondent chose to regard them, new employees from the start of the 1954-55 season.¹⁸ Their status as employees had not been affected by the fact that for some 8 days they were on strike, and they were therefore entitled to be placed on Respondent's new seniority list, though, as previously found, Respondent could lawfully reduce their seniority below that accorded nonstrikers and replacements. As in the case of the 12 employees whom Respondent regarded as having quit, there was no economic justification for dropping them from the seniority list.

It is true that Respondent in hiring employees for the 1954-55 season, after exhausting its March 18, 1954, priority list, and before hiring persons not previously employed, followed the 1952-53 seniority list, but it is clear that it did so because of pending litigation, as a matter of caution, and not because it considered that the employees in question had acquired and retained preferential status and were entitled to such status as a matter of right. There is of course a difference between a right and a gra-

¹⁸Testimony of Florence E. Hawkins, personnel clerk:

Q. Miss Hawkins, were they [strikers not reinstated during the 1953-54 season] returned as new employees? A. Yes, sir.

tuity, and we are here concerned with rights under the Act.

It is found that the Respondent in denying seniority status to those of its employees who went on strike, were not replaced during the strike, and were not thereafter reinstated during the 1953-54 season, including the 12 employees who were offered and refused work on a night shift, discriminated against them with respect to terms and conditions of employment, thereby discouraging union affiliation, in violation of Section 8(a)(3) of the Act. The said action interfered with, restrained and coerced employees in the exercise of rights guaranteed under Section 7 of the Act, and constituted a violation of Section 8(a)(1) of the Act.¹⁹

¹⁹The Respondent in its brief argues that it was not shown that any of the persons whose seniority was affected were in fact strikers or affiliated with the Union. Respondent, however, admitted the allegations of the complaint that on December 1, 1953, the Union called the strike and on December 8 terminated it. This being admittedly a union strike it is immaterial whether the strikers were individually members of the Union, for discrimination practiced against them for engaging in the strike would be violative of the Act regardless of union affiliation, and would have the necessary effect of discouraging union affiliation. As to the identity of persons engaging in the strike, Hawkins testified that substantially all of the strikers upon termination of the strike signed an unconditional request for reinstatement. It is a reasonable inference that all persons signing such a statement of availability, were in fact strikers.

(3) Alleged discriminatory application of aptitude tests

Near the start of seasonal operations for the 1954-55 season, but not at the start, persons available for employment, both old and new employees, were given aptitude tests. Aptitude tests had not previously been used in Respondent's operations. These tests were administered by the California Bureau of Employment, and applicants for employment who failed to pass the tests, were not hired. There is no allegation in the complaint that these tests were discriminatorily applied against striking employees, but that was the position of the General Counsel at the hearing, and testimony in the matter was taken without objection. I shall therefore consider it though it would seem that a matter of such potential gravity would more properly appear as a part of the pleadings in the case.

The General Counsel's position rests on the contention that none of the employees whose names appeared on Respondent's March 18, 1954, seniority list were required to take the tests as a condition of being employed for the 1954-55 season, whereas all applicants for employment not on the March 18 list were required to take and pass the tests before being employed. It has been seen that the March 18 list contained the names only of persons who worked during the December, 1953, strike or were reinstated during the 1953-54 season, and it has been found that the Respondent was in violation of the Act when it deprived strikers who had not been re-

placed and who were not reinstated during the 1953-54 season, of seniority status.

In support of his position, the General Counsel examined but one witness. That witness was Respondent's personnel clerk, Florence E. Hawkins, acknowledged by the General Counsel to be a reliable witness.

Concerning the use of aptitude tests, Hawkins testified: " * * * it was purely experimental as far as the date industry was concerned. They had never tried it. These tests had been tried in various other lines of fruit, and * * * proved very beneficial, consequently, they weren't too sure as to what the results would be in our industry, but they wanted to try, and he [Proser, an employee of the State of California assigned to the Employment Office in Indio], plus Mr. Bonham (?) and all connected with the deal felt that they could do us a lot of good."

This is the sole evidence as to how the aptitude tests came to be given to Respondent's employees. I see nothing implausible about it.

Admittedly, no employee whose name appeared on the March 18 list was required to take the test before going to work. Admittedly, a substantial number of them were required to take the test after going to work. It was Hawkins' further undisputed testimony that not all persons hired whose names did not appear on the March 18 list, were required to take the test before going to work, though they

were later required to take the test. It would appear, however, that a majority of those whose names did not appear on the March 18 list were required to pass the test before going to work.

Concerning these matters Hawkins testified: “* * * we wanted everyone to take it [the aptitude test], but it just so happened that they couldn’t get setup down in time for it to be given to those people [referring to the March 18 list]. We called them in to work sooner than they were able to get the setup made. That is the reason they were hired without it.” Continuing with Hawkins’ examination by the General Counsel:

Q. But, at least, as far as 1954—the fall of 1954, the only people who were given these aptitude tests were those whom you regarded as new applicants?

A. No, that is not so, because, as I say, the only reason all of them weren’t given the test was because they didn’t have things available to give them that rapidly, but we had some people of this list that it was possible to give it to them. He had the time to give it to them, and it was possible that we could have them take it.²⁰

We had some on the list that had taken it, but not the complete list, you know, because we didn’t have the time, and wherever possible, I tried to see

²⁰ Respondent’s records corroborate ‘Hawkin’s testimony that a substantial number on the March 18 list, though by no means a majority of them, took the aptitude tests.

that they had the test, whether they were on the list or whether they were new ones.

Continuing further with General Counsel's examination of Hawkins:

Q. Now, with regard to people who went to work, and whose name was not on the March 18th list, were all of those required to take the aptitude test?

A. No, because there again they were not setup to handle them in the volume in which I was required to bring them in, consequently, it was necessary for me to hire people who had not had the aptitude test because they could not process them over there rapidly enough for us for our needs.

From the foregoing it is clear, if Hawkins is believed, that the sole reason why employees on the March 18 list were not given aptitude tests before being offered employment, is that at the time Respondent began hiring for its 1954-55 season, the State office was not as yet equipped to administer the tests, and for the same reason employees not on the March 18 list but the first to be hired among those whose names were not on the March 18 list, also were not given the tests before going to work. I can see no reason not to credit Hawkins who was the only witness to testify in the matter and whose testimony in all other respects has been given credence and has been relied on by the General Counsel. If this testimony is credited, and it is, there was no discrimination with respect to the aptitude tests

were administered, as between persons whose names appeared on the March 18 list and those hired later, that is not explained by the inability of the State office to process the tests in the order of hirings. It is also borne in mind that all strikers who were reinstated during the 1953-54 season appeared on the March 18 list. In common with all others on that list, they were not required to take the aptitude tests before going to work and if later required to take the tests, they suffered no loss of employment as a consequence thereof.

Finally, it appears that the General Counsel would have inferences of discrimination drawn from the fact that no one on the March 18 list was denied employment because of the aptitude tests whereas a number of those names were not on the March 18 list were denied employment on the grounds that they had failed the test. But it does not affirmatively appear that anyone on the March 18 list who took the test failed it. The General Counsel at the hearing stated that this was immaterial but I should think it would be material if failing the test they were nevertheless retained whereas employment was refused to those not on the list who failed the test. We must assume, however, that no one on the March 18 list failed to pass the aptitude test because there is no evidence that they did. Some of those not on the March 18 list did fail the test and were denied employment. We were asked to draw the inference of discrimination from these naked facts alone. But absent any evidence whatever

of the competence of those failing the tests other than the fact of acquired seniority, or evidence that the tests were more exactly applied in the one situation than in the other, or of collusion between the Respondent and the State office which applied the tests—for, if General Counsel is right it would amount to that—such an inference would in fact be not an inference but pure speculation.

It seems clear, and is found, that the General Counsel's position that the aptitude tests were used by Respondent to rid itself of unwanted strikers, for the reason that they went on strike, is without substantial support in the record.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It having been found that the Respondent engaged in unfair labor practices by refusing on and after November 10, 1954, to bargain with the Union though the Union had been properly certified as representative of its employees in an appropriate

unit, it will be recommended that on request the Respondent bargain with the Union.

It having been found that the Respondent discriminated against certain of its striking employees by depriving them of seniority status, it will be recommended that as to such of those who had acquired seniority status prior to the strike as shown by the inclusion of their names on the 1952-53 seniority list, and as to such of these as requested reinstatement upon conclusion of the strike, as shown by affixing their names to an availability list on or about December 8 or otherwise identifying themselves to Respondent as desiring reinstatement, the Respondent restore to such of them as have not since quit their employment or been discharged for cause,²¹ the seniority status that would have been accorded them had they been reinstated during the 1953-54 season, by inclusion of their names on the Respondent March 18, 1954, seniority list.

The General Counsel seeks a back-pay order, but I can find no basis in the evidence for such an order and therefore none will be recommended. It is true, as the General Counsel argues, that the computation of back pay may be left to compliance, but I consider it essential as a basis for a back-pay order even in general terms, that it be shown that losses were incurred as a result of the unfair labor prac-

²¹This qualification I deem necessary in view of the extraordinary (?) lapse of time between the occurrence of the unfair labor practices and the hearing herein.

tices. I do not find in the evidence here the slightest basis for an inference that money losses were incurred.

I do not find in the circumstances of this case a potential threat of future violations, or an underlying purpose generally to thwart and discourage organizational activities, and therefore I shall not recommend a broad cease and desist order.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. United Packinghouse Workers of America, AFL-CIO, Local Union No. 78, is a labor organization within the meaning of Section 2(5) of the Act.

2. Since October 21, 1954, the said labor organization has been and now is the exclusive representative of all Respondent's employees in the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All packing shed employees employed by the Respondent at its Indio, California, packing shed, excluding all office and clerical employees, and also excluding watchmen, guards, supervisors and professional employees as defined in the Act.

3. By refusing on and after November 10, 1954, to bargain collectively with the aforesaid labor organization as exclusive representative in the above

appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By discriminating in regard to the hire, conditions, and tenure of employment of its employees whose names appeared on the 1952-53 seniority list, who participated in the December 1-8, 1953, strike and thereafter unconditionally applied for reinstatement but were not reinstated during the 1953-54 season, thereby discouraging membership in the aforesaid labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not engaged in unfair labor practices by according its nonstriking employees and replacements during the period of the December 1-8, 1953, strike, super-seniority over its employees who participated in the strike.

8. The Respondent has not engaged in unfair labor practices by instituting and discriminatorily applying a system of aptitude tests.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that California Date Growers Association, Indio, California, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of United Packinghouse Workers of America, AFL-CIO, Local Union No. 78, or any other labor organization, by discriminatorily depriving employees of seniority status, or by any like or related manner discriminating in regard to hire and tenure of employment or any terms or conditions of employment;

(b) Refusing to bargain collectively with the above-named labor organization as the exclusive representative of all employees in the unit above found to be appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment;

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form and join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities except to the

extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which it is found is required to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of employees in the unit described above, with respect to their rates of pay, wages, hours of work, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Rescind forthwith its discriminatory seniority policy as represented by its March 18, 1954, seniority list, to the extent that that list omitted the names of striking employees who had acquired seniority status prior to the strike, were not replaced during the strike, and applied for reinstatement at the conclusion of the strike but were not reinstated during the 1953-54 season;

(c) Restore to all employees with seniority status as shown by the inclusion of their names on the 1952-53 seniority lists, who participated in the December 1-8, 1953, strike; who upon the conclusion of the strike requested reinstatement as shown by affixing their names to an availability list on or about December 8, 1953, or otherwise identifying themselves to Respondent as applicants for rein-

statement; who were not reinstated in the 1953-54 season and who have not since quit or been discharged for cause: to the seniority status that would have been accorded them had they been reinstated during the 1953-54 season in the same manner in which striking employees who were reinstated during that season, were accorded continuing seniority status;

(d) Post at its place of business in Indio, California, copies of the notice attached hereto as Appendix. Copies of the notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the date of the service of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply therewith.

It is further recommended that, unless within twenty (20) days from the date of the service of this Intermediate Report and Recommended Order the Respondent notifies said Regional Director that it will comply with the foregoing recommendations,

the Board issue an order requiring the Respondent to take the aforesaid action.

Dated this 20th day of February, 1956.

/s/ WILLIAM E. SPENCER,
Trial Examiner.

Appendix

Notice to All Employees Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in United Packinghouse Workers of America, AFL-CIO, Local Union No. 78, or in any other labor organization, by discriminating with respect to seniority or any term or condition of employment.

We Will Not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership

in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

We Will bargain collectively, upon request, with the above-named labor organization, as the exclusive representative of employees in the appropriate unit, with respect to grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The appropriate unit is:

All packing shed employees employed at the Indio, California packing shed, excluding all office and clerical employees, and also excluding watchmen, guards, supervisors and professional employees as defined in the National Labor Relations Act.

We Will restore to the seniority status that would have been accorded them had they been reinstated upon conclusion of the December 1-8, 1953, strike, all employees with previously acquired seniority status who participated in that strike, who were not replaced during the strike, who applied for reinstatement at the conclusion of the strike but were not reinstated during the 1953-54 season, and who have not since quit or been discharged for cause, and will add their names to the March 18, 1954, seniority list, in the order in which they appeared on the 1953 seniority list.

We Will rescind our policy of depriving the aforesaid employees of seniority status.

All our employees are free to become or remain members of the above-named or any other labor organization. We will not discriminate in regard to hire or tenure of employment against any employees because of membership in or activity on behalf of any such labor organization.

CALIFORNIA DATE
GROWERS ASSOCIATION,
Employer.

Dated

By,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Issued June 21, 1957.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT
AND RECOMMENDED ORDER

Comes now the California Date Growers Association, Respondent-Employer in the above-captioned case, and files its exceptions to the Intermediate Report and Recommended Order as follows:

1. Respondent Employer excepts to the Findings of Fact with regard to the issue of refusal to bar-

gain contained in said Intermediate Report. (Intermediate Report, p. 5, line 12, to p. 8, line 51.)

2. Respondent Employer excepts to the Findings of Fact with respect to the issue of those employees who the Trial Examiner finds "went on strike, were not replaced during the strike, and were not thereafter reinstated during the 1953-54 season, including the 12 employees who were offered and refused work on a night shift." (Intermediate Report, p. 14, line 4, to p. 15, line 15.)

3. Respondent Employer excepts to paragraphs 2, 3, 4, 5 and 6 of the Conclusions of Law in said Intermediate Report. (Intermediate Report, p. 18, line 50 through p. 19, line 31.)

4. Respondent Employer excepts to the Recommendations in said Intermediate Report. (Intermediate Report, p. 19, line 42, through p. 21, line 5.)

5. Respondent Employer excepts to the "Notice to All Employees" appearing in the Appendix to said Intermediate Report.

6. Respondent Employer excepts to the following rulings upon motions and objections made at the hearing by the Trial Examiner:

(a) The admission in evidence of General Counsel's Exhibit 3 (Reporter's Transcript of Hearing, p. 44, line 17, to p. 46).

(b) The admission in evidence of General Counsel's Exhibit 7a to 7c, inclusive (R. T. p. 90-93).

(c) The denial of Respondent's Motion to Dismiss (R. T. p. 127, line 15, to end of p. 188).

(d) The exclusion of evidence offered by the Respondent (R. T. p. 237-239).

These exceptions are based upon the Brief in support thereof submitted herewith, the Transcript of the Hearing before the Trial Examiner, and the pleadings, papers and files in this case.

Dated: March 23, 1956.

Respectfully submitted,

BEST, BEST & KRIEGER,

By /s/ JOHN D. BABBAGE,

Attorneys for Respondent.

Received March 26, 1956.

[Title of Board and Cause.]

STATEMENT OF EXECPTIONS

General Counsel hereby excepts to the Intermediate Report and Recommendations of the Trial Examiner herein as follows:

Page 10, lines 13-22.*

1. To the finding that "Motive controls here * * * and the employer has the right to take such other action as he deems necessary to protect and

*[Refers to Page and Lines on original.]

continue his business in the face of an economic strike, providing his motive is, in fact, to protect and continue his business, and not to retaliate against and punish his striking employees.”

Page 10, lines 39-46.

2. To the finding that “With respect to its action in reducing the seniority of reinstated strikers, we have the undisputed testimony of its general manager, James F. Wright, that this action was taken for the purpose of reassuring its non-striking employees and replacements concerning the continuity of their employment, and because it considered such action essential to safeguard and protect its economic interests in continuing to operate during the strike.”

Page 12, lines 28-34.

3. To the refusal to find that the reduction in seniority of reinstated strikers had not actually been determined at the time the strike was concluded and therefore could not have had as its moving cause the protection and continuance of Respondent’s business during the period of the strike, but must have been designed to punish strikers for striking.

Page 13, lines 6-11.

4. To the Trial Examiner’s finding that even if no definite formula for a revised seniority policy had been determined until after the strike, such

delay would have little significance if, as Wright testified, assurances had been given to nonstrikers, during the strike, concerning the continuity of their employment.

Page 13, lines 13-15.

5. To the finding that the General Counsel has not proved unlawful motive in a situation where motive is controlling.

Page 13, lines 13-33.

6. To the Trial Examiner's failure to distinguish the Circuit Court decision in the Potlatch¹ case.

Page 13, lines 35-42.

7. To the Trial Examiner's finding that he is bound to follow the decision of the Circuit Court in the Potlatch case.

Page 13, lines 59-62, Page 14, lines 54-56.

8. To the Trial Examiner's finding that cases cited by the General Counsel are inapposite because of express limitations stated in Section 8 (b) (2) and the proviso of Section 8 (a) (3) of the Act.

Page 13, line 42 to page 14, lines 1-2.

9. To the finding that the Respondent did not violate the Act when, for economic reasons, it gave

¹N.L.R.B. vs. Potlatch Forests, Inc., 189 F. 2d 82 (C.A. 9).

nonstriking employees and replacements seniority over striking employees.

Page 14, lines 43-44.

10. To the finding that Respondent could lawfully reduce the seniority of strikers below that accorded nonstrikers and replacements.

Page 15, lines 17-45; Page 16, lines 1-62; Page 17, lines 1-50.

11. To the Trial Examiner's conjectures about the General Counsel's position and his comments based on these conjectures.

Page 15, lines 17-45; Page 16, lines 1-62; Page 17, lines 1-50; Page 16, lines 13-14.

12. To the Trial Examiner's failure to limit his finding relative to aptitude tests to the undisputed fact that: No employee whose name appeared on the March 18 list was required to take the test before going to work. Ergo, no employee discriminatorily deprived of seniority should be required to take the test before going to work.

Page 18, lines 20-30.

13. To the finding that striking employees should receive only partial restoration of their pre-strike seniority.

Page 18, lines 57-59, Page 18, lines 26-28.

14. To the finding that "in view of the extraordinary (?) lapse of time between the occur-

rence of the unfair labor practices and the hearing herein" there should be no restoration of seniority to strikers who have "since quit or been discharged for cause."

Page 18, lines 32-39.

15. To the finding that no back pay should be ordered.

Page 19, lines 33-36.

16. To the conclusion that Respondent has not engaged in unfair labor practices by according its nonstriking employees and replacements during the period of the December 1-8, 1953, strike, super-seniority over its employees who participated in the strike.

Page 19, lines 38-39.

17. To the true conclusion that "Respondent has not engaged in unfair labor practices by instituting and discriminatorily applying a system of aptitude tests." This matter was not in issue.

Page 20, lines 21-38.

18. To the recommendation that striking employees receive only partial restoration of their pre-strike seniority.

Page 20, lines 41-42 (Notice ii).

19. To the failure of the proposed notice to provide for full restoration of seniority to all strikers who enjoyed pre-strike seniority.

Page 20, lines 41-42.

20. To the failure to find that striking employees were reduced in seniority or deprived of seniority to punish them for striking.

21. To the failure to find that assurances to non-strikers are not the same as a strike seniority policy.

22. To the failure to recommend an appropriate remedy, restoring to all strikers the benefits which they would have received if their seniority had not been reduced or removed, including back pay where their employment was limited or denied by the new seniority policy.

23. To the failure to recommend an adequate notice.

Respectfully submitted,

/s/ GEORGE H. O'BRIEN,

Counsel for the General Counsel, National Labor
Relations Board.

Dated at Los Angeles, California, this 23rd day
of March, 1956.

Received March 26, 1956.

[Title of Board and Cause.]

PETITION FOR RECONSIDERATION OF
BOARD'S DECISION AND ORDER DATED
JUNE 21, 1957

Respondent, the California Date Growers Association, files this petition for reconsideration of the Board's Decision and Order of June 21, 1957, and respectfully requests reconsideration on the following grounds:

I.

Respondent objects to the conclusion of the Board supporting the Regional Director's findings with respect to the status of the ballots of the 12 employees who refused jobs on the night shift in January, 1954. The Respondent's position is that the actions of these employees in refusing night work after the strike was different from the ordinary situation wherein an employee on a day shift declined night shift work.

The record discloses the following facts:

1. Eight of these employees had never refused night shift work before.
2. All of these employees were strikers.
3. All of them had signed the availability sheets after the strike.
4. Eight of these employees had previously worked night shifts or had stated on their applications that they would accept night work.

5. Five of these employees did not apply for employment at any time during the following season (1954), although all of them were notified of the availability of work during the next season.

These employees were:

Anna Gagnon

Lillian Fieber

Virginia Luna

Celia Vasquez

Florence Flores

6. Only four of the twelve employees testified at the hearing on challenges.

7. Among the remaining eight employees who did not testify were the five who did not apply for employment during the following season.

The Board's decision fails to recognize that Respondent is engaged in a seasonal industry. New applications for employment are received every season. Each year the employees are in fact "new employees." It is for this reason that the Respondent uses "priority lists" and "hiring lists" rather than a "seniority list." The pattern of employment is vastly different from a year round activity wherein an employee's day-to-day job status is based on seniority. Furthermore, the Respondent has no way of knowing whether any or all of the employees from the previous season will re-apply during the following season. The available labor source is limited in the area. An employee who quits during one season can readily expect to be re-employed during the next season because the em-

ployee knows that labor is in short supply. The "priority" and "hiring" lists are an effort on the part of respondent to give some recognition to those employees who do reapply for work in successive seasons, but the employees from the previous season are not automatically on the payroll the following season. The Respondent determined in the early years of its operation that so many gaps occurred by reason of the failure of many employees to return during successive seasons that it could not operate with a fixed "seniority list" of employees from year to year. Thus, Mr. Wright's statement (Hearing on Challenges April 29, 1954, p. 39) that an employee lost his position on the priority list if the employee refused night work, meant that the employee was treated the same as if the employee had quit. Only those employees discharged for cause (and even under those circumstances there have been exceptions) are not likely to be re-employed in a succeeding season.

The point made by Mr. Wright's testimony is that the twelve employees who did not accept night work were relinquishing any further opportunity of employment during that season. These employees should have known that, and they should not have been entitled to vote under the terms of the consent election agreement.

The crucial test, however, is whether or not any of these employees intended to quit by not accepting the night work offered to them. The only way this can be determined would be on the basis of

some sort of showing that these employees had or had not intended to quit. We are dealing with the question of what was in the minds of these employees. Did they intend to merely reject the shift offered, or did they intend to look elsewhere for employment and quit their job at Respondent's plant? People's motives apparently play an important part in the Board's decisions. It is noted that certain motives are ascribed to Respondent and are considered as controlling by the Board in determining whether an unfair labor practice was committed by Respondent (pp. 3 and 4 in Board's Decision). The Board's conclusions with respect to Mr. Wright's motives, whether in fact right or wrong, are at least based on his voluntary testimony.

With respect to the motives of these twelve employees, however, the Board has adopted the assumption that the eight employees who did not testify did not intend to quit. It is understandable that it could have been concluded from the testimony of the four who did testify that these four did not intend to quit even though their testimony on this issue is not clear. But to assume that the remaining eight had the same intentions or would so testify, is, we earnestly believe, completely unfounded. In other words, there was no evidence whatsoever as to whether these remaining eight employees intended to quite or merely intended to refuse work on a particular shift. Furthermore, among the remaining eight employees who did not testify, five of these employees did not apply for employment at any time during the following season

(1954) although all of them were notified in the usual course of business of the availability of work. These five employees were:

Anna Gagnon

Lillian Fieber

Virginia Luna

Florence Flores

Celia Vasquez

The failure of these employees to apply for work during the next season makes even more important the need for testimony with respect to their intention at the time of their refusal to accept night work. These circumstances also make more certain the Respondent's position that they in fact quit their employment.

The Board's decision turns on the point that it was Respondent's prior practice to permit daytime employees to decline night shift work without loss of their status as employees. We urge that this practice is not relevant to the issue in this case. The Respondent's prior practice would be important in a discriminatory discharge case or in a constructive discharge case. Thus, if the employer was attempting to sustain a right to discharge these employees, it would be material and relevant to consider whether the employer had discharged employees under similar circumstances before. But this is not such a case. The Respondent does not claim to have discharged these employees. Its contention from the very inception of this case has been that these employees quit. Respondent introduced evidence

that each of these employees had quit. (P. 59 Hearing on Challenges, April 29, 1954.) As to four of the employees, the evidence was, to some extent at least, contradicted by the testimony of the four employees who testified. But what about the other eight? Assuming they were unavailable or unwilling to testify, not even an informal statement or hearsay evidence was sought to be introduced indicating their intention.

It is this complete absence of contradictory evidence with respect to the employees who did not testify, and particularly the five who did not apply during the next season, that is the basis of Respondent's contention that the Regional Director's Decision was arbitrary and capricious. A decision of the Regional Director is arbitrary and and capricious if it is based on no evidence of a probative character. That is certainly the case with respect to the eight employees who did not testify. The Board's Decision says in effect that it is inferred that these employees did not quit because in the past when an employee working days declined night work the employee was not discharged. Such an inference does not follow. Whether an employee quit is determined by the actions, attitude or state of mind of the employee. Whether an employee was "not discharged" is determined by the actions, attitude or state of mind of the employer.

We respectfully urge that the Board has mistakenly adopted the reasoning that an "inference" exists that these eight employees did not intend to

quit. Such an inference under the circumstances of this case is contrary to existing law. There is a legal presumption that a person intends the ordinary consequences of his voluntary act. The ordinary consequences of a person's refusal to accept employment is that the employee does not want the job, and if he has previously been employed by the party offering the employment, that the employee has quit. Some evidence must be introduced to overcome this presumption. The testimony of the four employees who testified can perhaps be considered as sufficient to overcome the presumption as to these four. As to the eight who did not testify, the presumption has not been overcome. In the absence of such evidence with respect to the eight employees, the presumption continues to exist and has the mandatory effect of establishing that the employees in fact quit.

We strongly urge that the Decision permitting the counting of these challenged votes should not be approved merely because the union or the Hearing Officer for the Board failed to produce certain witnesses or failed to produce any evidence of what their testimony would be. It is improper to infer what absent witnesses might say. The Regional Director's Decision, based on inferences, unsupported by evidence, is arbitrary and capricious.

II.

Respondent respectfully requests the Board to reconsider the statement in its Opinion which reads as follows:

“The Respondent’s entirely unjustified refusal to bargain and its conduct in discriminating against the above employees, supported neither by economic nor other valid reasons, persuade us that it was motivated by a desire to avoid all bargaining with the Union and to punish those employees who had not returned to work during or since the strike.”

This statement seeks to condemn Respondent’s general manager for lawfully asserting his company’s rights within the scope of the Rules and Regulations of the Board and the provisions of the National Labor Relations Act as Amended. Respondent has, of course, no control over what the subjective feelings of the Board may be with respect to any particular case. Respondent should, however, be able to act within the Rules and Regulations of the Board and applicable Statutes without fear of being abused in a published decision of the Board condemning him because he acted within his rights.

III.

In view of the Board’s consistent position with respect to the Potlatch case, Respondent here states its exception to this portion of the Board’s decision without argument. It is apparent that the Board disagrees with the Potlatch case, so any further attempt by Respondent to convince the Board of the applicability of the Rules of the Potlatch case to the instant case would be without avail. Respondent urges, however, that the Mathie-

son case is not applicable to the facts of the instant case.

Wherefore:

Respondent respectfully prays that the Board reconsider its Decision and Order of June 21, 1957, and

I. Set aside the election of February 18, 1954, and order a new election at an appropriate time.

II. Dismiss the unfair labor practice charges filed December 14, 1953.

Respectfully requested,

BEST, BEST & KRIEGER,

By /s/ JOHN D. BABBAGE,

Attorneys for California Date
Growers Association.

Dated: August 6, 1957.

Received Aug. 8, 1957.

[Title of Board and Cause.]

ORDER DENYING PETITION

On June 21, 1957, the Board issued a Decision and Order in the above-entitled proceeding. Thereafter, on August 8, 1957, counsel for the Respondent filed a Petition for Reconsideration of the said Decision and Order. The Board having duly considered the matter,

It Is Hereby Ordered that the said petition be, and it hereby is, denied on the ground that nothing has been presented that was not previously considered by the Board.

Dated, Washington, D. C., September 3, 1957.

By direction of the Board.

FRANK M. KLEILER,
Executive Secretary.

Before the National Labor Relations Board
Twenty-first Region
Case No. 21-CA-2130

In the Matter of:

CALIFORNIA DATE GROWERS ASSOCIA-
TION,

and

UNITED PACKINGHOUSE WORKERS OF
AMERICA, AFL-CIO, LOCAL UNION
No. 78.

Monday, January 9, 1956

Before: William E. Spencer, Trail Examiner.

Appearances:

GEORGE H. O'BRIEN,

Appearing on Behalf of the General Coun-
sel of the National Labor Relations
Board.

BEST, BEST & KRIEGER, By
JOHN D. BABBAGE,

Appearing on Behalf of California Date
Growers Association, the Respondent.

JOHN JANOSCO,

Appearing on Behalf of the United Pack-
inghouse Workers of America, CIO,
Local Union No. 78.

* * *

PROCEEDINGS

* * *

Mr. O'Brien: Mr. Examiner, I shall ask the reporter to mark as General Counsel's Exhibit 2 the record in the representation case docketed as case No. 21-RM-280, described in the complaint, and the certification which forms the basis for the allegation of the complaint that there has been a refusal to bargain, that is, the obligation to bargain is based upon the documents which I have assembled as General Counsel's Exhibit 2. By statute, of course, they become part of the unfair labor practice case.

For the convenience of all parties here, I have assigned letters to the various documents and put in the front of it a table of contents where I have identified these documents beginning with the petitioner General Counsel's Exhibit 2-A filed December 9, 1953, and ending with a copy of a letter [8*] from Mr. Babbage dated October 29, 1954, identified as General Counsel's Exhibit 2-MMM.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

I am offering General Counsel's Exhibit 2 in bulk. [9]

* * *

Trial Examiner: Do you have an objection, Mr. Babbage, to receiving it?

Mr. Babbage: No objection.

Trial Examiner: General Counsel's Exhibit No. 2 is received in evidence.

(Thereupon, the documents above-referred to were marked General Counsel's Exhibit No. 2-A through 2-MMM and were received in evidence.)

* * *

GENERAL COUNSEL'S EXHIBIT No. 2-A

United States of America
National Labor Relations Board

PETITION

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act.

Case No.: 21-RM-280.

Date Filed: 12-9-53.

Compliance Status Checked By: /s/ DB.

Instructions—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

Attachments Required—Except when this Petition is filed by an employer under Section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition.

* * *

B. ☒ RM—Representation (Employer)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in Section 9 (a) of the act.

* * *

2. Name of Employer:

California Date Growers Association.

Employer Representative to Contact:

J. D. Babbage.

Phone No.:

Riverside 598.

3. Address of Establishment Involved:

Corner Highway 99 and King Street, Indio.

4a. Type of Establishment:

Date packing shed.

4b. Identify Principal Product or Service:

Processing and packing dates.

5. Description of Unit Involved:

Included—all packing shed employees, including floor ladies employed at the company's Indio, California, packing shed.

Excluded—office and clerical employees, truckdrivers, guards and watchmen and supervisory employees as defined by the National Labor Relations Act as amended.

* * *

8. Recognized or Certified Bargaining Agent:

United Fresh Fruit & Vegetable Workers Local Ind., Union No. 78.

Address:

1010 So. Broadway, Los Angeles 15, California.

Affiliation:

CIO.

Date of Recognition or Certification:

12-27-51.

* * *

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

CALIFORNIA DATE
GROWERS ASSN.,

By /s/ J. D. BABBAGE,
Attorney.

Address: Evans Bldg., Riverside, Calif.
Telephone number: 598.

Wilfully False Statement on This Petition Can
Be Punished by Fine and Imprisonment (U. S.
Code, Title 18, Section 1001).

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-B

Best, Best & Krieger
Attorneys at Law
Evans Building
Riverside, California

December 10th, 1953.

National Labor Relations Board,
111 West Seventh Street,
Los Angeles, California.

Re: California Date Growers Association, Em-
ployer. United Fresh Fruit and Vegetable
Workers, Local Industrial Union 78 CIO.

Gentlemen:

I enclose herewith a copy of a telegram received from the above-captioned Union, wherein this organization presented a claim to the employer to be recognized as a representative of the employees of the employer as defined in Section 9 (a) of the Act.

A copy of this telegram is being forwarded to you pursuant to your rule requesting evidence in support of the petition of representation filed by the employer in the above-captioned matter on December 9th, 1953.

Yours very truly,

/s/ J. D. BABBAGE.

JDB:ms

Encl.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL's EXHIBIT No. 2-C

Western Union

[Telegram]

December 8, 1953.

California Date Growers Association,
Indio, California.

LIU 78 CIO Calls Off Strike at the California Date Growers Association and Valley Date Gardens. The Members Will Return to Work Immediately. Re-

quest We meet December 9th at 10:30 A.M. to Negotiate Issues in Question.

C. F. MOORHEAD,

Vice President, LIU 78 CIO.

Indio, California.

MSD

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-K

United States of America
National Labor Relations Board

Agreement for Consent Election

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby waive a hearing and Agree as Follows:

1. Election—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election

shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

2. Eligible Voters—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military service of the United States who appear in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election and any employees on strike who are not entitled to reinstatement. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. Notices of Election—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of

the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. Observers—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. Tally of Ballots—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties. When appropriate, the Regional Director shall issue to the parties a certification of representatives or certificate of results of election, as may be indicated.

6. Objections, Challenges, Reports Thereon—Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate

the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

7. Run-off Procedure—In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in accordance with the Board's Rules and Regulations.

8. Commerce—The Employer is engaged in commerce within the meaning of Section 2(6)(7) of the National Labor Relations Act.

Copy

9. Wording on the Ballot—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory

to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

First.

Second.

Third.

Fourth.

10. Payroll Period for Eligibility—

The last complete payroll period in January, 1954.

11. Date, Hours, and Place of Election—

Date: Thursday, February 18, 1954.

Hours: Between the hours of 1:15 p.m. and 2:15 p.m.

Place: At the Employer's packing shed in Indio, California.

12. The Appropriate Collective Bargaining Unit—

Including all packing shed employees employed by the Employer at its Indio, California, packing shed;

Excluding all office and clerical employees, and also excluding watchmen, guards, supervisors, and professional employees as defined in the National Labor Relations Act, as amended.

Those eligible to vote shall be all persons who were employed in the bargaining unit set forth above during the last complete payroll period

in January, 1954, and including all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election.

If Notice of Representation Hearing has been issued in this case, the approval of this agreement by the Regional Director shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

UNITED FRESH FRUIT & VEGETABLE
WORKERS LOCAL INDUSTRIAL UNION
No. 78, CIO.

(Petitioner);

By /s/ C. F. MOORHEAD,
Vice President.

CALIFORNIA DATE GROW-
ERS ASSOCIATION,
(Employer);

By /s/ J. D. BABBAGE,
Attorney.

Recommended:

/s/ IRVING HELBLING,
Field Examiner, National
Labor Relations Board.

Date approved: February 5, 1954.

/s/ GEO. A. YAGER,
HOWARD F. LeBARON,
Regional Director, National
Labor Relations Board.

Case No. 21-RM-280.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-P

United States of America
National Labor Relations Board

Case No. 21-RM-280

In the Matter of:

CALIFORNIA DATE GROWERS ASSOCIA-
TION,
(Employer and Petitioner).

and

UNITED FRESH FRUIT & VEGETABLE
WORKERS LOCAL INDUSTRIAL UNION
No. 78, CIO,
(Union).

Date issued: February 18, 1954.

Type of election: Consent.

TALLY OF BALLOTS

The undersigned agent of the Regional Director
certifies that the results of the tabulation of ballots

cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters:	182
2. Void ballots	0
3. Votes cast for United Fresh Fruit & Vegetable Workers Local Industrial Union No. 78, CIO	69
4. Votes cast for	
5. Votes cast for	
6. Votes cast against participating labor organization(s)	70
7. Valid votes counted (sum of 3, 4, 5, and 6) .	139
8. Challenged ballots	65
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	204
10. Challenges are (not) sufficient in number to affect the results of the election	
11. A majority of the valid votes counted plus challenged ballots has (not) been cast for: United Fresh Fruit & Vegetable Workers Local Industrial Union No. 78, CIO.	

For the Regional Director,

/s/ GEO. A. YAGER.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For United Fresh Fruit & Vegetable Workers
Local Industrial Union No. 78, CIO,

/s/ HECTOR HINOJOSA.

For California Date Growers Association,

/s/ J. D. BABBAGE.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-T

Florence Hawkins,
Box 1626, Indio,
44-835 King St.
No Phone.

I, Florence Hawkins, after being sworn hereby say I have been employed by the Company about 11½ years. I am a distribution clerk. As such I handle payroll problems and other office functions. Around the middle of August or the first of September, I started to handle applications for employment. I also keep Social Security Records and call the employees for work. I call the employees for the 1953 season. Before the start of the season I sent a form letter, identical to the one attached, to every person on the seniority. I also sent the same letter to all persons who didn't have established seniority but who worked the previous season for less than 12 weeks. By the time we finished getting all the people we needed the seniority list had been

exhausted. We had to hire about 75 persons without established seniority who worked last year and about 50 persons who had no previous employment at the company.

About the first week in November the company started a night shift. About that time Mr. Yowell told me we were going to start a night shift and we would need about 15 employees.

Fay Gillespie, the head of the Packing Department, told me that two girls wanted to transfer to night work and that she would transfer them.

In securing help for the night shift I first went to the applications for employment and called all those who had said they wanted night shift work. I left those applications separated from the applications which showed the employee didn't want night shift work. The employees who were hired for night shift either were not on the seniority list or had never worked for the company in the past.

Around January 16 Mr. Yowell told me we were to put on a night shift. He told me we would need 17 employees. He brought me a seniority list and told me to call the employees in the order in which they were listed. I did so. I had no conversation with him about the status of the persons on the list and merely followed the direction he had given me.

When I called the employees I asked them if they wanted to return to work. I told them we were putting on a night shift and asked if they wanted to work on it. The employees gave me their reasons

for refusing to take the night shift. Others accepted the work. Several employees said they could only work days. The reasons the employees gave for refusing night were all personal reason having to do with child care, transportation or other similar problems. About two employees asked me if we had any day work. I told them we had a full crew and didn't need any day workers. Ellen Chester was one, Catherine White was the other. I don't remember any employee saying they had more seniority than day workers who were employed. I am quite sure I had no conversation about seniority with any of the employees.

At no time did I check the names of the persons who refused night work with their applications to determine what they said in regard to accepting night work.

/s/ FLORENCE E. HAWKINS.

Subscribed and sworn to before me this 9th day of March, 1954.

/s/ IRVING HELBLING,
Field Examiner.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-Z

[Title of Board and Cause.]

REPORT ON CHALLENGES

Pursuant to an Agreement for Consent Election entered into by the above-named parties on February 5, 1954, a representation election was conducted on February 18, 1954, among certain employees of the above-named Employer to determine whether they wish to be represented for the purposes of collective bargaining by the United Fresh Fruit & Vegetable Workers Local Industrial Union No. 78, CIO. The results of the election, as set forth in a Tally of Ballots served on all the parties on that date, were as follows:

Approximate number of eligible voters	182
Void ballots	0
Votes cast for United Fresh Fruit & Vegetable Workers Local Industrial Union No. 78, CIO	69
Votes cast against participating labor organization	70
Valid votes counted	139
Challenged ballots	65
Valid votes counted plus challenged ballots	204
Challenges are sufficient in number to affect the results of the election.	

Pursuant to paragraph 6 of the Agreement for Consent Election, the undersigned has investigated

General Counsel's Exhibit No. 2-Z—(Continued)
the challenged ballots and issues this report thereon.

The Challenges to the Ballots of Hugh Davis, Rupert Hamlin, and Homer Miller.

The Union challenged the ballots of these employees and contends that they are ineligible to vote because they are not employed within the bargaining unit as set forth in the consent election agreement. Each of these employees is engaged in the maintenance of the equipment in the Employer's plant. They are paid on an hourly basis and have no supervisory responsibility.

The unit agreed upon by the parties is "all packing shed employees employed by the Employer at its Indio, California, packing shed; excluding all office and clerical employees, and also excluding watchmen, guards, supervisors, and professional employees as defined in the National Labor Relations Act, as amended."

On December 10, 1951, a consent election agreement was entered into for a unit substantially similar to the one herein involved. The same maintenance employees worked for the company at that time. They were on the eligibility list used for the conduct of the election on December 17, 1951, and voted unchallenged ballots. Although they were clearly in the bargaining unit as first certified, the Union apparently has not bargained for them, and no wage rate is set up for maintenance employees

General Counsel's Exhibit No. 2-Z—(Continued)
in the contract which existed between the Company
and the Union.

On the morning of the day on which the election in this matter was conducted a conference was held with the parties by the Board's Field Examiner. At that time the eligibility of the maintenance employees was discussed and the Union's representative agreed that they were eligible to vote in the election.

In view of the inclusion of the maintenance employees in 1951, the agreement prior to the holding of the present election that they were eligible to vote, and the all-inclusive language of the unit definition in the consent election agreement, without any specific exclusion of maintenance employees, the undersigned finds that this classification is included in the bargaining unit and, therefore, the three above-named employees are eligible to cast ballots in the election. The undersigned, therefore, overrules these challenges of the Union and directs that these three ballots be opened and counted.

The Challenges to the Ballots of Gracie Carr, Effie Gray, Jeanette Jones, and Lora McMullen

The Union challenged the ballots of these employees and contends that each of them is a supervisory employee and, therefore, ineligible to vote.

The investigation reveals that Carr, Jones, and McMullen are floorladies on each of the Company's

General Counsel's Exhibit No. 2-Z—(Continued)
grading lines. Effie Gray is the general floor supervisor. The line floorladies have no authority to hire, discharge, or effectively recommend personnel action, while Gray has such authority. The Company agrees that Gray possesses substantial supervisory authority and is not eligible to vote.

During the eligibility conference on the morning of the election the Union's representatives agreed that the three line floorladies exercised no substantial supervisory responsibility and that they should be eligible. In addition to this agreement, these employees have always been covered by the contract which existed between the Company and the Union.

In view of the above, the undersigned finds that Effie Gray possesses substantial supervisory authority and, therefore, sustains the challenge to her ballot. Carr, Jones, and McMullen are not supervisory employees and, therefore, the challenges to their ballots are overruled. It is directed that their ballots be opened and counted.

The Challenges to the Ballots of William Lopez and Francisco Perez

The ballots of these employees were challenged by the Company because their names did not appear on the Company's seniority list for the 1953 season. The investigation has revealed that both of these persons had previously been employed by the Company until they were inducted into the armed

General Counsel's Exhibit No. 2-Z—(Continued)
services. Each of them has been on military leave, and each returned to the Company's employ in February, 1954. The Company concedes that they are eligible to vote, and the undersigned so finds. It is directed that their ballots be opened and counted.

The Challenge to the Ballot of Lucy Chavez

The Company challenged the ballot of this employee and contends that she quit her employment because she had refused to accept work on the night shift. The investigation has revealed that the Company's contention was made in error as Chavez had, in fact, accepted such night shift work and was employed by the Company during the eligibility period. The Company concedes she is eligible to vote, and the undersigned so finds. It is directed that her ballot be opened and counted.

The Challenges to the Ballots of

Arce, Maria
Barajas, Lupe
Carranza, Espiranzo
Chavez, Mary
Cokeley, Helen
Cox, Howard
Curiel, Eva
DeZamilja, Jesus
Forney, Lilly May
Gombo, Virginia
Garcia, Videl

General Counsel's Exhibit No. 2-Z—(Continued)

Garcia, Trinidad
Gomez, Matilda
Grey, Troy
Hinojosa, Hector
Hinojosa, Maria
Ingraham, Shirley
Kraus, Florence
Lopez, Josephine
Lowe, Dorothy
McCain, D.
Montes, Fred
Murrietta, Ruth
Narciso, Curiel
Pizano, Jesse
Pizano, Pedro, Jr.
Putman, Ann May
Reyes, Carolina
Romero, Ignacio
Salas, Josephine
Santos, Joe
Singh, Maria
Tyler, Ann
Villalodas, Thelma
Williams, Ruby

Eligibility to vote in the election was described by the parties in the consent election agreement as:

“Those eligible to vote shall be all persons who were employed in the bargaining unit set forth above during the last complete payroll period in January, 1954, and including all per-

General Counsel's Exhibit No. 2-Z—(Continued)

sons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election.”

The investigation has revealed that none of the employees named were employed by the Company during the last complete payroll in January, 1954, nor did their names appear on the 1953 seniority list. None of these persons had enough continuous service during the preceding packing season to qualify them to permanent seniority. Most of these persons were employed by the Company until December 1, 1953, at which time a strike occurred. Most of them were strikers. On December 8, with the termination of the strike, they applied unconditionally to return to work, but were not re-employed because work was no longer available due to a substantial loss of the Christmas trade.

The Union contends that if these employees were not replaced during the strike they are eligible to vote, either as strikers or as laid-off employees.

The undersigned finds that as none of these persons qualified for permanent seniority their expectation of re-employment in the future is merely speculative. As they were not employed during the payroll period of January, 1954, nor did they qualify for a place on the 1953 seniority list, the undersigned finds that these employees do not meet

General Counsel's Exhibit No. 2-Z—(Continued)
the eligibility test established by the parties in the consent election agreement. Therefore, the undersigned finds that the challenge to each of these ballots should be sustained.

The Challenges to the Ballots of Everett Barham,
Alberto Esquer, Albert Luna, Ernest Martinez,
and John C. Pogue

These five persons were out on strike on December 1, 1953. They unconditionally applied for reinstatement on about December 8, 1953. During the strike the Company hired approximately 35 employees as replacements for the strikers. As most of the strikers were employed as either graders or packers whose jobs are indistinguishable from other graders or packers, the Company conceded that most of the replacements could not be identified with any particular employees. It, therefore, agreed that none of the packers or graders could be considered as having been replaced during the strike. It reserved the right, however, to challenge those strikers who had been employed in jobs easily identifiable, and who had been replaced.

Everett Barham was employed to remove fruit from the fumigator and deliver it to the washer. He was the only person performing such work. He was permanently replaced on December 2, 1953, by Castulo Garcia.

Alberto Esquer was a carloader and also performed some work in the shipping department. He

General Counsel's Exhibit No. 2-Z—(Continued)
was permanently replaced on December 2, 1953, by
Albert Porter.

Albert Luna was a set-up man in the packing department. He was permanently replaced on December 2, 1953, by Jack Reynolds.

John C. Pogue was a pallet truck operator. He was permanently replaced on December 4, 1953, by Francisco Duenaz.

Ernest Martinez was a carloader and also performed some work in the shipping department. He was permanently replaced on December 2, 1953, by Charles Gamble.

As the consent election agreement excluded from eligibility those persons who had been permanently replaced, and as the investigation reveals that specific replacements were hired for each of these five persons, the undersigned finds that each of them is ineligible to vote and, therefore, sustains the challenges to their ballots.

The Challenge to the Ballot of Celia Vasquez,
Maude Place and Mary Lozano

The Company challenged the ballot of Celia Vasquez on the ground that she had refused work when she was called. The investigation reveals that in September, 1953, just before the beginning of the packing season, the Company sent Vasquez a registered letter asking her to apply for employ-

General Counsel's Exhibit No. 2-Z—(Continued)
ment for the coming season if she was interested. The Company received no reply to this letter, and the letter was returned to the post office marked unclaimed. As Vasquez did not answer the call for employment at the beginning of the season, her name was dropped from the seniority list. On November 19, 1953, she applied for work and was hired as a new employee. She worked until the strike on December 1, but did not gain re-employment after that time.

Maude Place was offered employment at the beginning of the 1953 season, but refused to accept it. She was dropped from the seniority list and has not been employed since that time.

As these employees were not working for the Company during the last complete payroll period in January, 1954, and as they had lost their status on the 1953 seniority list, they do not meet the eligibility test set up in the consent election agreement. The undersigned, therefore, sustains the challenges to their ballots.

Mary Lozano was a striker who was reinstated to her previous job after the strike. She worked until February 9, 1954, at which time she quit her employment. Although she was employed by the Company during the last payroll period of January, 1954, and was not so employed at the time of the election, she, therefore, was ineligible to vote. The undersigned sustains the challenge to her ballot.

General Counsel's Exhibit No. 2-Z—(Continued)

The Challenges to the Ballots of

Carrillo, Manuela
Chester, Ellen
Dallosta, Lucretia
Fieber, Lillian
Flores, Florence
Gagnon, Anna
Quijadas, Lupe
Romero, Socorro
Ruby, Mayme
Skinner, Pauline
Warren, Beryl
White, Catherine

Each of these persons had status on the Company's 1953 seniority list, and each of them went out on strike on December 1, 1953. Each unconditionally applied for reinstatement on or about December 8, 1953. In the second week of January, 1954, the Company started a night shift on which approximately 17 persons were to be employed. The Company offered these persons employment on the night shift; however, each of them refused for personal reasons. In view of this refusal to accept night shift work, the Company contends that these persons have quit their employment and, therefore, are not eligible to vote.

The investigation reveals that each season the Company has had a night shift which usually starts toward the middle of the season. By the time the

General Counsel's Exhibit No. 2-Z—(Continued)
night shift was to begin all persons on the seniority list have been offered employment. At the beginning of each season the employees fill out new applications for employment, and they are required to state whether or not they will accept night shift work.

In the past, in staffing the night shift the Company first offered to all day shift workers the opportunity to transfer to the night shift. Most employees refuse the offer. They were always free to do so, and their refusal did not in any way affect their status with the Company. Many of the employees who refused had worked on the night shift in previous seasons, and many of them had stated in their applications that they would accept night shift work. None of these factors ever affected their status or their freedom to decline such employment.

In the past seasons, when it was impossible to get enough employees to transfer to the night shift, the Company then checked the applications of those persons not employed and offered employment to all who had expressed a willingness to work on the night shift. Failing to secure enough employees in this manner, the Company then offered such employment to any other person willing to accept it.

After the strike the Company wished to recall strikers when they were needed in a nondiscriminatory manner. It advised the Union's representative that it intended to start the night shift, and, in order not to discriminate against strikers, it intended to

General Counsel's Exhibit No. 2-Z—(Continued)
offer employment on the night shift to those strikers on the seniority list who were not employed. The Union's representative stated that such a policy would not be regarded by the Union as discriminatory.

When recruitment for the night program began, the Company, as was its usual custom, offered such employment to its day shift employees. Failing to secure enough transferees, it then offered employment to those strikers on the seniority list who had not been re-employed. It started with the person at the top of the list.

The Company contends that always in the past when an employee refused employment for day work at the beginning of a season he would be dropped from the seniority list and lost his seniority status. It would apply the same rule under these circumstances.

The consent election agreement provides that all persons whose names appear on the 1953 seniority list are eligible to vote, excluding those persons who have quit or been discharged for cause. Clearly, these employees were not discharged, nor can the undersigned find that they have quit their employment. It appears that always in the past employees were free to accept or reject night shift work, and their rejection of such work in no way affected their status as employees. In the past, of course, employees who rejected night shift work were employed

General Counsel's Exhibit No. 2-Z—(Continued)
at the time of such rejection and merely continued on in their day shift jobs. However, at the beginning of the season when they filled out their applications for employment and expressed unwillingness to accept night shift work, their status was not affected.

In the present instance the employees were not advised that a rejection of the offer of night shift employment would affect their status on the seniority list. The employees could reasonably conclude that the previous practice continued, particularly, as each of them had registered for re-employment after the strike, and as most of them inquired about the probability of employment on the day shift when they rejected the night shift offer. The status of these employees was no different from those persons then employed; the only exception being that no work was then available for them. The employees on the day shift freely rejected the offer of night shift employment, and their employee status was not affected. To rule that these challenges should be sustained would be to find that the persons involved were not employees, but were merely applicants with no previous employment with the Company. It appears to the undersigned that essential to a conclusion that a person has "quit" his employment is a finding that he engaged in conduct or performed an act which he could reasonably believe would lead to a severance of the employer-employee relationship. This is not the case here.

General Counsel's Exhibit No. 2-Z—(Continued)

The Company contends that to permit these employees to retain their status on the seniority list after having rejected employment is unfair to those persons below them on the list, as a rejection of day shift work has always meant the loss of seniority status. By holding that these employees are eligible to vote, the undersigned makes no finding as to what the Company's future hiring practice should be in the light of these circumstances. It is merely held that these persons, under these circumstances, have not lost their employee status because of their rejection of the offer of employment on the night shift. The undersigned finds, therefore, that the challenges to the ballots of these 12 employees should be overruled and directs that these ballots be opened and counted.

Dated at Los Angeles, California, this 24th day of March, 1954.

/s/ HOWARD LeBARON,
Regional Director, National Labor Relations Board,
Twenty-first Region.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-GG

[Title of Board and Cause.]

ORDER DIRECTING HEARING ON
CHALLENGES

Pursuant to an Agreement for Consent Election, an election was held in the above-entitled proceeding on February 18, 1954, under the direction and supervision of the Regional Director in which challenged ballots are sufficient in number to affect the result of the election. On March 24, 1954, the Regional Director issued and served upon the parties his Report on Challenges. On April 8, 1954, the Employer filed Objections to Report on Challenges wherein the Employer asserts that the Regional Director erroneously resolved the challenges to the votes of:

Carrillo, Manuela

Chester, Ellen

Dallosta, Lucretia

Fieber, Lillian

Flores, Florence

Gagnon, Anna

Quijadas, Lupe

Romero, Socorro

Ruby, Mayme

Skinner, Pauline

Warren, Beryl

White, Catherine

and also filed a Petition for Hearing on Challenges. No objections were filed by either party to the reso-

lution by the Regional Director of other challenges.

The Regional Director having duly considered the Employer's objections has decided that a hearing should be held to resolve the issues raised by the challenges to the ballots of the twelve individuals above named. Accordingly, it is,

Ordered that on the 29th day of April, 1954, at 10:00 a.m., in the Main Accounting Office of the California Date Growers Association, located at corner of Neglet Noor and Highway 99, in the City of Indio, a hearing will be conducted before a hearing officer upon said challenges, at which time and place the parties above named will have the right to appear in person or otherwise and give testimony and present argument, and it is further

Ordered that the testimony at such hearing shall be limited to matters relating to and affecting the status of the above-named individuals as employees and their eligibility to vote under the terms of the consent election agreement.

In due course thereafter, the undersigned shall issue and serve upon the parties a Supplemental Report on Challenges.

Dated at Los Angeles, California, this 22nd day of April, 1954.

[Seal] /s/ GEORGE A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-first Region.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-KK

Before the National Labor Relations Board,
Twenty-first Region

Case No. 21-RM-280

In the Matter of:

CALIFORNIA DATE GROWERS ASSOCIA-
TION,

Employer and Petitioner,

and

UNITED FRESH FRUIT & VEGETABLE
WORKERS LOCAL INDUSTRIAL UNION
No. 78, CIO,

Union.

Thursday, April 29, 1954

Before: George H. O'Brien, Hearing Officer.

Appearances:

BEST & BEST & KRIEGER, By
JOHN BABBAGE,

Appearing on Behalf of the Company.

JOHN JANOSCO,

Appearing on Behalf of the Union.

* * *

PROCEEDINGS

* * *

General Counsel's Exhibit No. 2-KK—(Continued)

Hearing Officer: I think, so that we may know what we are talking about here, I suggest that the report on challenges, [4] dated 21st March, 1954, be identified as Board's Exhibit No. 1;

That the objections to the report on challenges filed by the employer on either April 6th or 8th—I cannot make out the date stamp—

Mr. Babbage: It should be April 8th.

Hearing Officer: —April 8th, be identified as Board's Exhibit No. 2;

And that the Regional Director's order directing this hearing, shall be marked Board's Exhibit No. 3, which should frame the issues in the proceeding this morning. [5]

* * *

JAMES F. WRIGHT

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Babbage:

Q. Will you state your name?

A. James F. Wright.

Q. And your occupation?

A. General Manager of California Date Growers Association.

Q. And, as general manager, do you have the responsibilities for the supervision of the operations of the California Date Growers Association?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. That is right.

Q. Now, you are familiar with the fact that the California Date Growers Association and the CIO, United Fresh Fruit & Vegetable Workers, Local Industrial Union No. 78, entered into an agreement for a consent election, the date of which I do not have as a matter of record, but which agreement was entered into in the latter part of January, 1954; is that right?

A. Yes.

Hearing Officer: The date is material. The date of approval is February 5, 1954.

Q. (By Mr. Babbage): Thereafter, on the 18th day of February, an election was held at your plant?

A. That is right.

Q. Mr. Wright, would you describe for the Board, the nature of the date packing operation in this plant and just what this plant does in connection with the processing and packing of dates?

A. We have been in the business of packing dates since 1919. We receive the fruit from the field, grade it, pack it and ship it to market. We normally start operations some time in August or September. The operation continues until the following spring.

The number of employees that we have varies upon the [8] season, depending upon how many dates we have to pack that particular year.

Q. I also want to bring out the form of organization which you have. You are a co-operative, is that right?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. We are a co-operative, made up of some eighty to one hundred growers.

Q. And when you refer to "growers"—describe just what you mean by a "grower"?

A. Date growers are people who are in the business of raising and harvesting dates.

Q. When those dates come into the plant, what type of process do you go through in connection with these dates?

A. When they first come into the plant, they are fumigated, then graded. Some dates require hydration to add moisture content to them. Some are what we call a "natural" date. Then the fruit is packed in various containers. [9]

* * *

Q. Then, if you don't have a ready market for the dates, do you have a method for storing them?

A. We have cold storage facilities. [11]

Q. You have those here on the plant?

A. Yes.

Q. Would you explain to us the frequency with which dates arrive in the plant?

In other words, is this a crop that everything becomes ripe right away and you have to pick it immediately, or is it a crop that tends to ripen at different places at different times?

A. The crop is harvested from September normally through February.

Q. What are the factors that affect the time at which a crop is harvested?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. Well, weather conditions; a definite amount of heat is required to mature the dates and until a certain number of heat days are obtained, the fruit isn't mature, and cannot be packed and that varies, depending upon the location in the valley.

Q. In other words, you are not able to control the time at which dates are coming into the plant?

A. No.

Q. On the basis of knowing exactly how many are going to come in at any particular time during the year?

A. No.

Q. Now, can you predict from one year to the next, how many dates you are going to pack? [12]

A. No, we cannot.

Q. Why can't you?

A. Well, we have growers who are free to leave each year. The amount of fruit that is grown from year to year in the valley varies.

A few years ago we had thirty-five and thirty-six manpower crops and then latterly the last few have been under thirty men. It depends upon the elements.

Q. Going into a little more detail on the effect of the elements, is it true that at the beginning of a season—I will withdraw that question.

How do you determine each year when your season is going to start—that is, when your packing season is going to start?

A. Well, there are two conditions. We normally carry some fruit over from the previous season to

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

pack and distribute in the month of September; depending upon how much fruit we carry over, it will depend upon when we start the packing operation.

Some years we start in August and some years we start in September. We know normally by August, within two or three weeks of when the fruit will mature and start to come into the packing house. That is, the current crop.

Q. When you say you sometimes have fruit left over from the previous season, do you mean by that that this fruit can be stored in an uncured or an unprocessed form, for a period of a [13] year or under a year?

A. Dates, being tropical fruit, under storage conditions, can be held for many, many months over a year, depending upon the type of date. They can be held as high as two or three years.

* * *

Q. In a situation where you have a light market for dates—in other words, the particular opportunities for the sale of the [14] dates is say, less than it was the year before, or it doesn't have particularly encouraging characteristics, do you start——

Describe how you would start the packing season, whether you are operating on dates carried over from the previous year or dates that were just coming in for the first time this year.

A. We normally start the packing season with carry-over fruit and that fruit is carried in, the ma-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

jority of it, in a loose condition and we start off normally, with a packing line to pick these carry-over dates.

Our first operation normally is to call in a packing crew. [15]

* * *

Q. When you start operations, do you ordinarily start with one line—withdraw that question.

How many lines do you operate in your plant?

A. Well, we have three lines in the packing room and the overwrapping packages and we have three cellophane wrappers.

Q. Do you start off with three lines at once at the beginning of the season?

A. Practically without exception, we start with one line.

Q. Could you describe for us the practice that is followed in calling employees or getting in touch with employees whom you wish to have operate one of these packing lines?

A. Either the plant superintendent or the woman in charge of [18] the packing room will contact the girl in the personnel office and she will, through the use of the telephone, endeavor to contact the people required for the line and tell them when work is to start and when they are to report in.

Q. And who is the girl in the personnel office who does that work now?

A. Florence Hawkins.

Q. For how long has she done that work?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. She started into it last September—this particular job.

Q. And who did it prior to the time she did?

A. Levina Kaltenbach.

Hearing Officer: Would her name be on one of the seniority lists?

The Witness: No, but it is spelled K-a-l-t-e-n-b-a-c-h.

Q. (By Mr. Babbage): Was there anyone else who assisted her or did they work in conjunction with her, prior to the time that Florence Hawkins did the work?

A. Seasonally we had someone else in the office who would aid—but I cannot recall the girl's name. I might add that, during the last season, two weeks prior to the estimated start of the season, we mailed notices to the employees of the previous season, stating the date that we anticipated starting operation.

Q. Do you recall when you started operation during the last season? [19]

A. We started packing before Labor Day. But we didn't start the grading until somewheres around the 25th of September. But, if my memory serves me right, we started packing around the week before Labor Day or the day after Labor Day.

Q. You were packing carry-over fruit, in other words? A. Yes.

Q. Mr. Wright, would you tell us the basis upon which you called employees or which employees were

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

called by your personnel department, who had the responsibility, during the last season?

A. Yes. In the packing department we had a seniority list and Florence Hawkins called the girls in order by their number on the seniority list until she was able to obtain enough girls to run a packing line.

Q. Do you recall how many employees were called to start the packing operation in the 1953 season?

A. Approximately seventeen.

Q. Now, you mentioned a seniority list, would you tell us how that seniority list was made up?

A. The seniority list was developed in November. This particular seniority list, November of 1952, it was made. A girl had to have worked either twelve weeks in a particular season or fifty per cent of the season, if it was less than twelve weeks.

Q. In other words, the factor of the length of time which an [20] employee had worked for the company, wasn't the controlling factor. It was the question of whether she had worked twelve weeks consecutively in some previous season?

A. Yes.

Q. Did it have to be some previous season or the immediately preceding season?

A. The immediately preceding season and so on back.

Q. Or it could also be the season which began in 1952?

A. Yes.

Q. In other words, if she had worked twelve

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

weeks in 1952, prior to the time the seniority list was developed? A. That is right.

Q. She was also to be on the seniority list?

A. That is right.

Hearing Officer: I wonder if that is clear.

A girl might work from say, 1927 to 1935 steady; would she stay put on the list if she hadn't worked since?

The Witness: No.

Hearing Officer: How recently had she to work to get on the list?

The Witness: She had to work the previous season.

Q. (By Mr. Babbage): She would have had to have worked——

A. ——twelve weeks in the previous season.

Q. In 1951?

A. When the seniority list was made up in November, we had [21] started operations that particular August and some girls had the opportunity to have worked twelve weeks during the 1952 season.

Hearing Officer: What I am trying to get at is, you could have a steady employee who worked for you from the time the plant started until 1950, but who had missed the 1951 season, but she would not be on this list?

The Witness: Unless there was a legitimate reason for her absence.

Hearing Officer: Yes. I see.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

The Witness: But if she had worked somewhere else that season, she would have lost her seniority.

Q. (By Mr. Babbage): Was that the first year that you had a seniority list as such? A. Yes.

Q. And what basis did you use for determining what employees were entitled to employment, prior to the time this seniority list was developed?

Did you have some other list or some other arrangement that you followed?

A. Prior to November, 1952, we utilized the payroll records of the previous season and we had, what we called a "priority list," a list that the girls got on because they were capable of running a box machine or capable of running a wrapping machine. [22]

Now, I am talking about the people who are on this list prior to 1952. They were willing to work two or three days a week. They were willing to work maybe four or five hours in a day if that was what we needed. They were willing to work when the weather was warm.

Q. Hot, you mean?

A. Hot, yes. And whether they were willing to work nights. [23]

* * *

Q. (By Mr. Babbage): Mr. Wright, if you will refer to Board's Exhibit No. 1, which is the report on challenges. On page 8 thereof.

And also to Board's Exhibit No. 2 which is the objections to the report on challenges.

And I would like to ask you if you will read the

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

first paragraph on page 8 of the report on challenges.

Hearing Officer: Just to yourself, sir.

Mr. Babbage: Yes. You don't have to read it into the record, just to yourself.

The Witness: Yes. [24]

Q. (By Mr. Babbage): Is that paragraph correct? A. Yes, it is.

Q. Now, I will ask you to read the second paragraph on page 8 of Board's Exhibit No. 1.

A. Yes.

Q. Now, I ask you, Mr. Wright, if that paragraph in the report on challenges correctly states the manner in which your company operates?

A. The first sentence states that, "each season the Company has had a night shift which usually starts toward the middle of the season."

That is correct.

The second sentence states, "By the time the night shift was to begin, all persons on the seniority list have been offered employment."

The past season is the only season which we operated, or it was the first season where we operated, where there was a seniority list in effect.

It is true that in that season we had offered employment to everyone on the seniority list.

The closing sentence, "At the beginning of each season the employees fill out new applications for employment, and they are required to state whether or not they will accept night shift work."

They are not required to state it. There is a place on [25] the form to state it and——

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

Q. Isn't it a fact, Mr. Wright, that some of the applications that have that statement on them are filled out and in some applications it is left blank; is that right?

A. That is true. Some say either, some say nothing and some say yes.

Q. And do you not require the employee to state one way or the other? A. No.

Q. Now, you say that during the 1953 season, which—you say that 1953 was the only season that you operated under the seniority list?

A. From the start of the season.

Q. Now, when did the night shift begin in the 1953 season? A. Some time in October.

Q. And I will refer you now to the third paragraph of Board's Exhibit No. 1 and ask you to read that paragraph. A. Yes.

Q. Now, is it true that in starting the night shift, the company first offered all day shift workers the opportunity to transfer to night shift, either in the past or in the 1953 season?

A. No, that isn't. We have offered—first of all, in the 1953 season, we did not ask the people on the day shift whether they would like to work nights or not. [26]

We went out to staff the night shift from our applications. It was known that we were going to have a night shift and if my memory serves me right, two people asked to be transferred to the night shift.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

Q. That is, two people who were working days at that time?

A. Yes. We never asked everybody on the day shift. Specifically, we were interested in obtaining a few people who could form the nucleus of the crew at night. Maybe one or two foreladies and some box machine operators and wrapping machine operators.

The rest of the crews we normally manned from our applications in the personnel office.

The next sentence states, "Most employees refuse the offer." That isn't true because we didn't offer it to them.

Q. Then, it goes on to state that, "they"—meaning the employees—"were always free to do so"—meaning that they were always free to refuse the offer, "and their refusal did not in any way affect their status with the company."

Now, I will point out to you that this particular portion of this exhibit refers to what your past operations have been and I ask you if that is a correct statement of your past operations?

A. The way it is written—of course, they were free to because it is free country—but they recognized that by taking night shift work, that they could advance themselves in [27] the company, that by going onto the night shift, they might have an opportunity of becoming a machine operator and as a result, better their position and also, going back in the past, by volunteering say, to go onto the night shift and as a result, become a machine operator.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

They knew that when the night shift closed, that they would come back to the day shift and the chances are if they wished to finish out the season and raise themselves on our priority list, raise their position within the company, and they were free to raise themselves or not. It was up to them. But they knew by doing it, that they would better their position.

Q. If an employee accepted any work prior to the time of your seniority list referred to in this exhibit, then it would either place him on the priority list or increase his or her rating on the priority list?

A. That is right.

Q. Is that right? A. Yes.

Hearing Officer: That refers to a period before 1952?

The Witness: Yes.

Hearing Officer: Before November, 1952, when you first established this list?

The Witness: That is right.

Hearing Officer: I am sorry. [28]

Mr. Babbage: All right.

Q. (By Mr. Babbage): I will refer you to the last—which is the fourth paragraph on page 8 of Board's Exhibit No. 1, and I ask if you will read that paragraph?

A. Are you referring to the bottom part?

Q. Yes. A. Yes.

Q. Does that paragraph correctly state the manner in which the company was operated in past sea-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

sons and for the purpose of answering your question, I think we will have to assume that "past seasons" means prior to the time that the seniority list was put into effect.

Hearing Officer: The testimony now is that that was November, 1952?

Mr. Babbage: Yes.

The Witness: Well, we never endeavored to completely man the night shift from people who were working days. We were interested in getting a nucleus of people for the night shift and foreladies, and machine operators, but we went through our applications and records which we had, to hire the main nucleus of the night shift.

I think the point that I want to get across is that this appears we first went to our day shift people to try to get them to go to work at nights, and that wasn't the way we did it. [29]

Q. I will refer you to the first paragraph beginning on page 9 of Board's Exhibit No. 1, Mr. Wright.

After you have read that——

* * *

Q. (By Mr. Babbage): Mr. Wright, are you reading that paragraph? A. Yes.

Q. And will you advise the Board whether that correctly stated the facts therein?

A. Yes, it does.

Q. I will refer you to the second paragraph beginning on page 9 and ask you to read that.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. Yes.

Q. Now, I might mention in developing my question with respect to that paragraph, that it appears that the language in that paragraph refers to a night shift which was begun subsequent to the time the strike occurred.

In other words, you have previously testified that you had [30] a night shift which began in October of 1953. Now, in this paragraph it refers to a second night shift and would you tell us when the second night shift began and the purpose for the second night shift?

A. If my memory serves me right, it was on the 18th of January. The purpose for the night shift—I mean, the purpose of the night shift was to pack a specialized package. The reason we had to put on a night shift was because it was a new pack and we only had bought enough pots to convert one box making machine and one wrapping machine.

Q. You just had one line?

A. Which was capable of offering this special package and we needed additional volume so we put on the night shift and if my memory serves me right, it was the 18th of January.

Q. Did you offer employment on that night shift to your day shift employees who were working at that time?

A. No, we did not.

Q. Did you offer employment to the strikers on the seniority list who had not been re-employed?

A. Yes.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

Q. And on what basis did you do that?

A. We started at the top of the seniority list. All people who were not working and who had stated that they desired to be re-employed or reinstated, and go back to work, they had signed a list back on December 8th— [31]

Q. Was that an availability list? A. Yes.

Q. And did any of them indicate on that availability list whether or not they would work days or nights?

A. No, they just stated that they would go back to work.

Q. In other words, it was just an offer to go back to work? A. Right.

Q. Now, I will refer you to the third paragraph beginning on page 9 and ask you to read that.

A. Yes.

Q. Is that a correct statement of your position, with the exception of the fact that it refers to a seniority list rather than a priority list?

A. That is right.

Q. I will refer you to the next paragraph, beginning on page 8, which would be the fourth paragraph—I mean on page 9—and ask you to read that?

A. Yes.

Q. Would you comment on that paragraph, Mr. Wright, and explain to us wherein it does conform to what has been the previous practice of the company and wherein it doesn't, if it doesn't?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. The consent election form did provide that all people on the 1953 seniority list were eligible to vote, excluding those people who had quit or had been discharged for cause. [32]

The last sentence states, "Clearly, these employees were not discharged, nor can the undersigned find that they have quit their employment. It appears that always in the past employees were free to accept or reject night shift work, and their rejection of such work in no way affected their status as employees."

Actually, that isn't true. This was the first time that the question of a seniority list, seniority worker, whether she would work night shift or not, had occurred.

Mr. Babbage: Would you read that answer back, Miss Reporter, please?

(Answer read.)

The Witness: In other words, the seniority list was put in, in November, 1952. We already had had our night shift. When they put on the night shift on October, 1953, all the people on the seniority list had been called to work. That was the first time the situation arose where we called a person on the seniority list to work at nights.

I might mention here that in our negotiations last fall, with regard to the grading room employees, it was decided and agreed in negotiations, that if an employee after the first of the year—we were re-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

ferring both to grading and packing—didn't want—only when an employee could get a leave of absence for some definite thing and the employee could not get a leave of absence—if, for example, we had only three or [33] four days' work in a week, that the employees, if they did not report, they would lose their seniority.

They could not get a leave of absence because our operation had been changed. I point that out to illustrate an agreement that had been reached prior to this time.

Now, in the past the workers knew, the employees knew that by working night shifts, working when the weather was hot, working three days a week, or 4 and 5 hours a day, by doing those things that they would be on the priority list and they knew that they would work the longest in the season and they also knew that they would be the first called back.

This is specifically true in the packing department and they knew by refusing that they would lose their status on the priority list.

Q. Now, when you say that they would lose their status on the priority list, do you mean that they would no longer be on that priority list?

A. That is right.

Q. I will now refer you to the last sentence of that paragraph which states, "However, at the beginning of the season when they filled out their applications for employment and expressed unwilling-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

ness to accept night shift work, their status was not affected."

Would you comment specifically on that sentence, if you can? [34]

A. At the time of filling out that application, the person who was showing a preference——

Q. Let me put the question this way. Did you have a—I will withdraw that question.

Under the priority list, when a person stated that they would not work a night shift, is it true that his status wasn't affected?

A. Well, they knew by not working, by being unwilling to do these things regarding our priority list, that they would not raise their position, that they would not be able to get on the list and if they did and they changed, they would lose their position and——

Q. Well, let me ask you this question. I will withdraw that.

Was anyone who wanted to work here entitled to fill out an application for work? A. Yes.

Q. In other words, the application form wasn't limited to the people who were just on the seniority or the priority list? A. That is right.

Hearing Officer: If I may interrupt for just one moment. I understood, Mr. Wright, at the beginning of the season, you would look for your supervisory personnel of your night shift from the day shift?

The Witness: That is normally so. [35]

Hearing Officer: Yes. And when you would offer

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

a night shift job to a day shift worker, that would be in the nature of a promotion for her?

The Witness: Yes.

Hearing Officer: Or an opportunity for promotion if she made good?

The Witness: Yes. If they were all machine operators or floorladies during the day, the opportunity of advancement was that they could be in the position of, if they went on the night shift, they could have an opportunity to advance and then when the night shift was over, those employees stayed on.

Hearing Officer: So, when a girl had shown special aptitude or she looked like a leader with leadership material, and you offered her a night shift job, and she turned it down, then that was the last chance she got?

The Witness: Yes and people would volunteer to go on the night shift just to get the opportunity.

Q. (By Mr. Babbage): Now, I will refer you to the first paragraph on page 10 and ask you to read that. A. Yes.

Q. And I will ask you to comment on to what extent that paragraph states the practice of the company and to what extent it doesn't, if it doesn't?

A. Well, it says, "the employees were not advised that a rejection of the offer of night shift employment would affect their [36] status on the seniority list."

That is true. They were not advised. The girl in the personnel department, I don't think should make

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

that decision any way and she was the one who was contacting the employees.

Q. Just a moment. Would you——

Mr. Babbage: Well, will you read that answer, please?

(Answer read.)

Hearing Officer: The witness was answering your previous question in between, I think.

Would you read the previous question, please?

(Question read.)

The Witness: I think that the employees under the operation that existed before November, 1952, could reasonably conclude that by refusing night employment and by refusing employment to work—by refusing night employment, they could conclude that their position with the company would be affected, just the same as they concluded, or could conclude, if they rejected work in September, that their status with the company was affected, that their status either on a seniority or on a priority list was changed and that they would lose what they had gained.

Then it goes on to say, "The status of these employees was no different from those persons then employed; the only exception being that no work was then available for them. The employees on the day shift freely rejected the offer of night [37] shift employment, and their employees' status was not affected."

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

That isn't true. It did not offer the work to the people on the day shift. We, in this particular case, we had a qualified group of people on the seniority list to form the nucleus. They were all qualified to work and handle the night shift and we did not offer employment to the people on the day shift.

So, there was a difference between the status on the day shift and these people we got for night work.

Q. Now, under the previous practice of the priority list, that is, when I refer to the previous practice, I mean the extension of the priority list as distinguished from it being called a seniority list.

What was the effect of a rejection of an offer of night shift work?

A. They would be off the priority list.

Q. Mr. Wright, can you tell us whether any of the employees who are referred to at the top of page 8 of Board's Exhibit No. 1 had previously worked on night shift?

A. Yes, quite a few of them had. In fact, most of them had at one time or other.

Hearing Officer: Have you checked your records recently on that?

The Witness: Yes. We went over it, Mr. O'Brien, when Mr. Helbling was down and I do not have that in front of me but we [38] gave that information to Mr. Helbling when he was here.

Q. (By Mr. Babbage): In other words, that information is available?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. Yes, I have got it somewhere.

Q. We will make an arrangement for you to present that information subsequently in your testimony.

A. I might state here, too, Mr. Babbage, that by refusing, and I think this is what the Hearing Officer—I mean, the Investigating Officer—I am confused here.

By refusing night shift work, we are not stating that the individual would not be re-employed again, but we are stating that they would only—that it was our practice after all of the other people who had accepted or who were here on the priority list and were employed—they would be re-employed, just like, say, in our day shift operation.

If someone should leave for a season or quit or not report in, that person may be re-employed again, but it would only be after all the people on the seniority list had been employed. As such, they have no position on a priority list.

Q. There is just a possibility of re-employment if it was available?

A. That is right and I might mention this, too, for the purpose of both lists, that we were concerned and the employees were concerned with not just working there but how long they would work here. Whether they would be called first and they would [39] be there and stay to the end.

Our operation reaches the peak some time in No-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

vember or December and at that time, there was ample employment for everybody. We are generally seeking employees to go to work, but then after the first of the year, specifically in packing, we normally get down to one crew and that one crew will work, depending upon how many dates we have and what type of season it is, but they will work up until May.

They may be off for a couple of weeks in between, but when we start out again in December, and maybe it will be two or three days before the dates come in, we will be working on carry-over fruit and both this priority list and the seniority list permits a person, gives us an orderly manner of deciding who will be the people to come in first and stay to the end.

And that in packing specifically is what the girls were working for. They knew that the work was there and while there was ample work, they didn't mind, because they didn't need any priority or seniority list at that time because they knew that Cal-Date had ample jobs, but they worked to get themselves into a position where they would come to work first and stay to the last, and in that case I am referring to a small nucleus of people, not two or three hundred people, who were working in the season.

I am referring to the packing specifically. In one line maybe there is twenty to twenty-five people grading in grading [40] itself.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

The grading is a little different because the grading operation starts in September on a pretty good level and within a week or so, we generally issue the seniority list and we stay at that level and then it comes to an abrupt close at the end, and so I think both lists were more important in the grading department than maybe for the women than any other people in the plant, because of the fact that one crew would work over a long period of time.

In fact, in 1952, one crew worked practically the whole twelve months.

Hearing Officer: Do you mean in grading?

The Witness: No, I mean in packing.

* * *

Cross-Examination

By Mr. Janosco:

Q. You testified here that prior to 1952, you had a priority list for people who worked because of special circumstances; is that correct?

A. Pardon?

Q. Because of special circumstances dealing with their employment, such as one or two days in a week or three days a week?

A. They fitted themselves into the condition that existed in [41] the industry and were willing to work with those conditions.

Q. In that type of a situation where the worker only worked five hours a day say three days a week, what happened to him when you went on a forty-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

hour week basis or a forty-eight-hour week basis; did he work for you just three days a week?

A. Oh, no, they would—you see, we may get an order for two thousand cases of dates and we have only got two hundred packs and we don't want to build up large stocks, so that we will——

Q. Let me clarify it.

You stated that you hired people during the 1952 season for three days a week; is that correct?

A. We did not hire them for three days a week. We may have an occasion where employment will only last—we are discussing now the time at the end of the season, times like now?

Well, we get a special order and we need them to come in and work for three days and that would be all. They are not hired on a continual basis just to work three days a week.

Q. You testified also that you hired workers who preferred to work nights only; is that correct?

A. I don't think I testified to that.

Q. Well, will you please explain what that priority list was then?

A. It was a list of people who were willing to work nights when we had night work, who were willing to come in at the end [42] of the season and work for us just maybe for three days when that was all the work we had.

They were willing to come in maybe in May, when it was very hot and work under those conditions. They were willing to—if we had something special,

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

to come in and work there for just four or five hours in a day.

They would become machine operators, had they obtained the skill. They would become box machine operators or they would become a forelady and it was the list that determined who these twenty-five people would be.

Q. Can you identify any of these people at the present time who were hired on that particular basis?

A. Well, it varied from year to year. I am talking about 1952.

Q. Can you identify any of these people that were hired on that basis you talk about?

A. In 1952?

Q. In 1952. A. Yes.

Q. Will you please list their names?

A. Well, I would have to go to records for it.

Q. Are any of these on the present seniority 1953 list? A. Oh, yes. [43]

* * *

Mr. Janosco: It appears that all the people who were on the priority list are on the regular seniority list for 1952 and 1953.

Hearing Officer: Thank you.

The Witness: With the exception of—

Mr. Janosco: —those you have quit or who have been discharged for just cause.

The Witness: I might add—you mention about

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

part time, but they were not hired for part-time work. They were hired to work through the normal season, but at the end of the season, it only lasted three days and they were willing to come in and work that time.

Q. (By Mr. Janosco): Well, then it is true that the workers were hired to work the regular scheduled work of the plant and not for any specific reasons such as hot weather or because of [45] short hours or because there was night work, but because it was the regular operation in the plant; is that not right?

A. Are you referring to the people on this priority list?

Q. On the priority list as well as the seniority list.

A. They were hired to work when the plant was working.

Q. On your regular scheduled hours?

A. Whether it was night work or three days a week or four days a week.

Hearing Officer: I think the question is: Was there any special arrangement made with individual employees?

For instance, when a girl makes an arrangement with her supervisor, and says, "I am only going to work Tuesday or Wednesday nights"?

The Witness: That is right.

Hearing Officer: I am sorry.

Q. (By Mr. Janesco): You spoke of a seniority

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

list for the packers and for the graders; is that two separate lists? A. Yes.

Q. How many separate seniority lists have you for the plant?

A. The contract calls for graders, packers and men.

Q. Were the men divided between the mechanical department and the workers who were working on production?

A. The men were on job classifications, not on a department basis.

Q. On job classifications? [46] A. Yes.

Q. For example, could a carpenter exercise his seniority to go into the plant and operate a machine?

A. If he is capable. If he had that classification, yes.

Q. Could a machine operator exercise his seniority to apply for a job if it became open in the mechanical department?

A. Well, the maintenance department is separate.

Q. A separate list for that? A. Yes.

Q. Actually, you had a separate list for the maintenance department? A. Yes.

Q. And the men working in the production department? A. Yes.

Q. Explain how the seniority worked regarding day shift operation and night shift operation?

A. There was no division. [47]

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

* * *

Q. Do you know of anyone in the company, in a supervisory capacity, who may have advised someone to ask workers on the day shift to transfer to the night shift? A. Yes.

Q. Do you know people? A. Yes.

Q. Who?

A. Well, Mr. Yowell, that would be under his jurisdiction.

Q. He would go to the plant and request people?

A. I don't know if he did but he would be the person who would know. Back prior to the 1953 season, I am sure people would be asked to work nights and who wanted to work nights.

Q. Did you ever discharge or fire anyone or lay anyone off because they refused to go on night shift during the 1951 or 1952 season?

A. We laid them off before the people were willing to work at nights.

Q. Who refused to work nights?

A. I said we laid them off prior to the time that the people who were willing to work nights.

Q. You laid off people—I am asking this question. Did you ever lay anybody off or fire anybody during the 1952 or 1951 season, who refused to go on the night shift? [51]

A. At the time they were asked?

Q. At the time they were asked? A. No.

Q. Did you ever call any of these people back

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

to work the following year if they refused to go on a night shift?

A. We may have, yes. May I say something?

Hearing Officer: I suggest that if you want to volunteer something, you should go over and ask your counsel first.

The Witness: No, I wanted to ask you whether regarding this question, whether I can elaborate on it just now or should I wait until Mr. Janosco is finished before I elaborate on the situation?

Hearing Officer: You can answer the questions just as fully or as simply as you wish.

If you don't understand the question, just say so, and if it goes back to a period before you have any actual knowledge, it would be a good idea to remind us of that fact.

Now, that reminds me; when did you obtain your present position?

The Witness: May of 1951.

I wish to point out then, Mr. Janosco, that a person who wasn't willing to work nights, wasn't willing to work shorter weeks, wasn't willing to work during the hot weather, that that person wasn't laid off or fired because of it but they were the last hired and the first to be laid off. [52]

* * *

Q. (By Mr. Janosco): I understand that you testified that in the past, if workers refused to go on the night shift, they were not fired.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

However, if they were not called back, at least, they were not called back as early the next season, is that correct?

A. That is correct. They were dropped from the priority list.

Q. When did you institute the policy of firing people for refusing night shift?

Mr. Babbage: I will object to the question. It is assuming a fact not in evidence because it has not been testified to in that way.

I think it is confusing the issues here by saying that, or by stating that they have instituted the policy of firing people when the processes by which the hiring and the seniority [58] list operates, has been described in some detail.

Hearing Officer: I will ask the witness to do the best he can with the question.

If he never fired anybody or if there is no such policy, he can so state.

The Witness: In January of 1954——

Mr. Janosco: That was——

The Witness: Wait now. In January of 1954, when we put on the night shift——

Mr. Janosco: That was after the strike.

The Witness: ——and we called the people on the seniority list, when they refused to come back to work, we said that they had lost their seniority and they had quit. We did not fire them. [59]

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

Recross-Examination

By Mr. Janosco:

Q. After the strike this year when it was agreed to call these people back to work, can you tell me what they were told when they came back and applied for work? A. Well——

Hearing Officer: First of all, did you give any instructions as to what applicants should be told?

The Witness: I told their plant manager to put on a night shift. We discussed it with Mr. Helbling. Mr. Babbage [67] discussed it with Mr. Helbling and Mr. Moorehead representing the union. I think it was in Mr. Helbling's office in Los Angeles.

We told him we were going to put on a night shift and we were going to call the people back following the seniority list.

To the best of my knowledge, the people were all contacted, told there was a night shift being put on and told them when it was going to be and asked them to come to work.

Q. (By Mr. Janosco): Isn't it true that when they applied for jobs, that they were advised that their seniority would begin as of that date?

A. That I don't know.

Q. Isn't it also true that they were also advised that they would start at fifteen cents an hour less than they had been receiving before?

A. They were hired back to the jobs available and the pay for those particular jobs. They may have been working on these jobs before.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

Q. Isn't it true that they were starting as new employees with a fifteen-cent-an-hour cut in wages?

A. They were hired back. There was no question raised to the best of my knowledge, which said that they were new employees or that they were not. They were told there was a job and they were asked to come back to work. [68]

The same thing is true in the grading department, when some nine or ten girls were hired back into the jobs that were available.

It so happened there that these jobs were the same jobs as they had been at before and they were hired back in the same rate because they were going back to the same jobs.

Q. In other words, the workers were not advised that they were losing seniority or that they were not taking a cut in wages?

A. No, actually, with regard to the seniority to the best of my knowledge, they were not advised—you said losing seniority—?

Q. Starting as new employees and losing their seniority also?

A. As far as I know, they were not advised of that and I gave no instructions to that effect. Regarding the pay, they were hired back at the pay of the job they were hired back to.

For instance, if a fork truck operator was hired and paid a certain amount of wages, if he was taken back as a dumper, he would be paid as that. [69]

General Counsel's Exhibit No. 2-KK—(Continued)

BERYL WARREN

a witness called by and on behalf of the Union,
being first duly sworn was examined and testified
as follows: [73]

Direct Examination

By Mr. Janosco:

Q. Will you tell us who you are employed by?

A. The Cal-Dates.

Q. When did you start working for Cal-Dates?

A. The fall of 1946. [74]

Q. In what department did you work?

A. Packing.

Q. What were your duties in the packing department?

A. You mean all the time, or——

Q. 1946. A. I was a weigher.

Q. Is that all you did during the year 1946?

A. Well, I packed candy and mostly that, yes.

Q. How long did you work for the company?

A. In 1946?

Q. From 1946 or for how long?

A. Every season.

Q. What part of the season did you work—did you usually start to work; the beginning of the season, the middle or what part?

A. In 1946 and 1947, I think I started around the 1st of November and the rest of the years I started in when the season started.

Q. How long did you work during the season?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Beryl Warren.)

A. In 1946 to 1947, the line I was working on was laid off and I was automatically laid off and the rest of the time I worked until the season was over with.

Q. Did you do any other type of work besides packing? A. Yes, I was a forelady.

Q. When did you become a forelady? [75]

A. 1951.

Q. 1951? A. Yes.

Q. Were you a forelady in the 1952 and 1953 season? A. Yes.

Q. Were you a forelady at the time the strike occurred? A. That is right.

Q. What were your duties as a floorlady or forelady?

A. I supervised the line that I was assigned to.

Q. During the time that you were a forelady, were you ever requested to go on night work?

A. When I became a forelady, that was the way I got to be a forelady. I was promoted to be forelady but they were putting a night shift on and the supervisor said if I wanted to go on night shift, I could be a forelady right away.

Q. When was that? A. 1951.

Q. The following year?

A. I was forelady on the day shift and they needed a supervisor on the night shift and they asked me if I would be a supervisor on the night shift over the whole packing.

Q. Did you go? A. I did.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Beryl Warren.)

Q. As a supervisor, did you ever request anyone to go on night shift work? [76]

A. I was on night shift at the time.

Q. Well, when you were working on day shift?

A. Yes, we were given instructions to ask our workers if they wanted to go on night shift.

Q. Did any of the employees that you asked to go on night work, go on night work?

A. Two women went in 1953.

Q. Did any of the employees refuse to go on night work?

A. All the rest of them said that they wanted to stay on day shift.

Q. Were these employees called back the following year at the beginning of the season but refused?

A. Pardon?

Q. The employees that refused to go on night work, were they called back according to seniority?

A. Yes.

Q. Was any one penalized for refusing to go on night shift? A. No.

Q. Was there a policy established that workers would be, if they didn't go on night shift?

A. There wasn't.

Q. Were you ever told by your supervisor to tell your workers that if they refused to go on night work, they would be penalized?

A. No, I was never told that. [77]

Q. Are you working for Cal-Dates now?

A. No.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Beryl Warren.)

Q. What was the last time you worked for the Cal-Dates?

A. The day we went on strike in December.

Q. Did you apply for a job after the strike?

A. Yes.

Q. What was told to you?

A. They called me to come to work on the night shift and the personnel girl called me to work and said they wanted me to come on the night shift and I asked if there was any day work to be had, and she said no, we would have to go on the night shift and I said I would go in and interview them.

Q. What happened when you came in for an interview?

A. We came in and we were told to wait until Mr. Yowell came back from lunch and when he interviewed us, he told us they were calling a night shift in to work for approximately four weeks to get this pack out that they had for the Lenten Season.

And that, when the pack was finished, we would be through until the following fall.

Q. What did you say?

A. I asked him about seniority and he said that our seniority would start the day we started on the line, the night we came in to work, that there was no more seniority.

Q. Did he say anything about wages to you?

A. Yes, he said we would go back to work on the

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Beryl Warren.)

line. We would not have our regular job, that we had when the strike was called.

Q. Are you willing to go back to work now?

A. Yes, if it is day shift work.

Q. In all the time that you worked for the Cal-Date Company, did you know of, or ever had any reason to believe that the company discharged or demoted anyone for refusing to take a night shift job?

A. Not to my knowledge, no. [79]

* * *

Redirect Examination

By Mr. Janosco:

Q. During that period when it was hot [84] weather and you were only working two or three days a week, were there many people that were directly working under you, who did not work some of these days?

A. You mean, the ones that were on the seniority——

Q. The ones that were on the seniority list or were not on the seniority list.

A. There were several.

Q. There were some people that did not come to work?

A. There were.

Q. Were those people penalized in any way for refusing to work?

A. No.

Q. Were they notified by the company or by any-

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Beryl Warren.)

one in responsibility that they would be penalized if they refused to work on those days?

A. Not to my knowledge. [85]

* * *

Redirect Examination

By Mr. Janosco:

Q. When your particular shift needed more workers, who requested more help?

A. The supervisor on the day shift requested it and when I [86] was on the night shift as supervisor, I told the personnel department if I was short of help and that I needed girls.

Q. When any of those—strike that.

Were any orders—when any orders were issued to the workers, working underneath you, did they come directly to you or by some supervisor, going over your head and issuing the orders?

A. Well, what orders do you mean?

Q. Well, suppose you needed workers on the night shift, how was that handled?

You would ask these people to go on the night shift?

A. This past year, in 1953, I was told by my supervisor to go and ask the girls on my line if they wanted to go on the night shift.

Q. And if you needed more help in your department because they could not keep up, how did you get more help?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Beryl Warren.)

A. I went to my supervisor.

Q. You requested it from your supervisor?

A. Yes. [87]

* * *

CATHERINE M. WHITE

a witness called by and on behalf of the Union,
being first duly sworn, was examined and testified
as follows:

Direct Examination

* * *

By Mr. Janosco:

Q. Please tell us when you started to work for
the Cal-Date Growers' Association? A. 1943.

Q. 1943? A. Yes.

Q. How long have you worked for the Cal-Date?

A. Almost eleven years.

Q. From 1943 through 1953?

A. That is right.

Q. Did you work there prior to the strike?

A. Yes.

Q. Did you go on strike? A. Yes.

Mr. Babbage: I didn't hear the answer to that
question.

The Witness: Yes.

Q. (By Mr. Janosco): In 1944, when you
started to work for Cal-Date, what date did you
start? A. 1944.

Q. Was it 1944 when you started?

A. 1943. [89]

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Catherine M. White.)

Q. What did you start in? A. Packing.

Q. Packing? A. Yes.

Q. What departments have you worked in since that time?

A. Well, in 1943 I started in the packing as a worker's weigher and in 1944, I was a grader. I graded all the year. In the next year, I was a weigher and from then on I was a machine operator until 1951, when I was a forelady.

Q. In 1951, you became a forelady?

A. Yes.

Q. Now, during that period, were you ever asked to go on night work? A. Yes.

Q. Did you ever go? A. Yes.

Q. What years? A. 1951 and 1952.

Q. Who asked you to go on night work during that period? A. The supervisor.

Q. How did the supervisor get people to go on night work?

A. Well, they asked the girls that worked on the day shift, if they could work nights.

Q. They asked the girls in the day time if they wanted to work nights? [90] A. Yes.

Q. Did any of the other girls that you know refuse to work nights? A. Yes.

Q. Were they penalized in any way for refusing night work? A. No.

Q. Now, in 1951 and 1952 you became a forelady? A. Yes.

Q. Were you a forelady during the day shift?

General Counsel's Exhibit No. 2-KK—(Continued)
[Testimony of Catherine M. White.]

A. I started on the day shift as forelady and then they asked me to go on night which I did.

Q. What year did you go on nights?

A. 1951.

Q. Nights in 1951? A. Yes.

Q. Did you work at nights during the 1952 and 1953 season? A. Yes.

Q. As a forelady? A. Yes.

Q. As a forelady, did you ever ask any of the people working under you to go on nights?

A. Yes.

Q. Did you ask the workers to go on nights?

A. Yes.

Q. Well, who asked you to ask these workers?

A. My supervisor.

Q. Did any of them refuse to go on nights?

A. Yes.

Q. Were they penalized in any way?

A. No.

Q. Were you advised by anybody above you to tell these workers that they would be penalized for not going, or if they refused night work?

A. No.

Q. Did you apply for work after the strike?

A. Yes.

Q. Who did you go to, and who did you talk to?

A. Well, I signed the availability slip.

Q. Did you talk to anyone in person?

A. No, I talked to Fay over the phone.

Q. Fay, that is the—— A. Supervisor.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Catherine M. White.)

Q. What did she say?

Hearing Officer: Could we have Fay's full name?

Mr. Babbage: Gillespie.

Q. (By Mr. Janosco): What did she say over the phone?

A. She called me and wanted me to go back to work on the night shift and she gave me to understand that I had no more seniority.

Q. That you had no more seniority? [92]

A. Yes, she said the day shift had preference because they had started in and worked so they had no seniority either.

Q. Did you accept any night work then?

A. No, I did not.

Mr. Babbage: What was the answer?

The Witness: No.

Q. (By Mr. Janosco): Were you advised that you would be penalized if you refused any night work? A. No.

Q. Did they offer to call you back next fall when the season opens up again?

A. Well, I do not think there was much said about it.

Mr. Babbage: I didn't hear the answer.

Hearing Officer: Would you read the answer, Miss Reporter?

(Answer read.)

Q. (By Mr. Janosco): Are you willing to go back to work for Cal-Date? A. Yes. [93]

General Counsel's Exhibit No. 2-KK—(Continued)

ELLEN CHESTER

a witness called by and on behalf of the Union,
being first duly sworn, was examined and testified
as follows:

Direct Examination

* * *

By Mr. Janosco:

Q. Mrs. Chester, did you work for the Cal-Date
Company? A. Yes, sir.

Q. When did you start working there?

A. Pardon?

Q. When did you start working for them? [100]

A. In the fall. I don't know the exact year but
in the fall when Japan declared war on the United
States.

Mr. Janosco: 1941.

Hearing Officer: 1940, wasn't it?

Mr. Janosco: Pearl Harbor was 1941.

The Witness: I was working when that hap-
pened.

Q. (By Mr. Janosco): Have you worked for
the Cal-Date Company continuously?

A. Not continuously.

Q. Did you have seniority established before the
strike was called? A. Yes, sir.

Q. This last December? A. Yes.

Q. What did you work at?

A. In the packing room.

Q. Did you get—

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Ellen Chester.)

A. You mean what did I work at, at the time of the strike?

Q. Yes. A. In the packing room.

Q. During the time when you worked for the company, were you ever asked to go on nights?

A. Yes.

Q. Did you go on nights?

A. Some years, yes. [101]

Q. The years that you did not go on at nights, were you ever penalized for it?

A. Not that I know of.

Q. Are you working for the Cal-Date now?

A. No, sir.

Q. Did you go back after the strike?

A. No, sir.

Q. Did you apply for a job after the strike?

A. I signed the availability slip.

Q. What happened after you signed that slip?

A. How do you mean?

Q. Did you talk to anyone about your job? Did you request anyone for re-employment?

A. No.

Q. Did the company offer you your job back?

A. They called me back in January to go on night shift.

Q. What did you do?

A. At that time, I did not have immediate transportation as my husband had our only car that was in operation at the time, and he was out on a service call, and I had to get in touch with him before I

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Ellen Chester.)

could say whether or not I had a way in.

And I could not come in for that night and I was told to come back in the next day.

Q. Did you go back the next day?

A. I did. [102]

Q. What did they tell you?

A. That my job was taken. I had a way of coming in then.

Q. You had a way of coming in then?

A. Yes.

Q. And your job was taken? A. Yes.

Q. Did they offer you another job?

A. No.

Q. What did they tell you about seniority; was it still there?

Mr. Babbage: I object to the question because it is leading.

Hearing Officer: Ask her who she talked to and what was said.

Q. (By Mr. Janosco): Who did you talk to about coming back or not, on that day?

A. To Florence Hawkins.

Q. What did she say?

A. She said she was sorry my place was filled.

Q. Did you apply after that date?

A. No, sir. I didn't see no reason to.

Q. Are you willing to go back to work for the company now? A. Yes, sir. [103]

General Counsel's Exhibit No. 2-KK—(Continued)

MAYME RUBY

a witness called by and on behalf of the Union,
being first duly sworn, was examined and testified
as follows:

Direct Examination

* * *

By Mr. Janosco:

Q. When did you start working for the Cal-Date
Association? A. 1943.

Q. Have you worked for them ever since then?
A. Yes.

Q. What department did you work in?
A. Packing.

Q. Did you ever work nights?
A. No, I haven't. [105]

Q. Were you ever asked to work on a night
shift?

A. Yes, they asked me to if I wanted to, but it
wasn't necessary.

Q. Were you ever penalized in any way for re-
fusing any night work? A. No.

Q. Were you working here during the strike?
A. Yes.

Q. Before the strike? A. Yes, sir.

Q. Did you apply for re-employment after the
strike? A. No.

Q. Did you sign an availability list for work?
A. Yes.

Q. Were you called back? A. Yes.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Mayme Ruby.)

Q. Did anyone call you to come back to work?

A. Yes.

Q. Who called you?

A. Here, from the office.

Q. Do you know who it was?

A. I was sick at the time with a bad cold and could not work, and normally I never did refuse to work, but when I got better so that I was able to work then, they did not have a place for me. [106]

Q. What did they tell you when you said you could not come to work? A. Pardon me?

Q. What did they tell you when you said you couldn't come back to work?

A. They said they didn't have a place for me when I called.

Q. Are you willing to go back to work now?

A. Yes, I could.

Mr. Janosco: That is all. [107]

* * *

LUPE QUIJADES

a witness called by and on behalf of the Union, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Janosco:

Q. How long have you worked for the Cal-Date Association? A. Three years.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Lupe Quijades.)

Q. What type of work did you do?

A. I weighed and I packed. I never stayed in one place. [110]

Q. You packed and weighed?

A. Yes. They moved me around.

Q. Did you ever work nights? A. No.

Q. Were you ever asked to work nights?

A. Yes.

Q. Were you ever penalized for refusing to work nights? A. No.

Q. Did you work here prior to the strike?

A. Yes.

Q. After the strike, did you apply for reinstatement?

A. Only when we signed those availability slips.

Q. Those availability slips? A. Yes.

Q. What did they tell you then?

A. Nothing. Afterwards I was called and I couldn't come and work.

Q. You were called to come to work?

A. Yes.

Q. By whom? A. By Florence.

Q. Why didn't you come back to work?

A. Well, I did not tell her exactly. That day I had a miscarriage when they wanted me to come back and I had a miscarriage. [111]

Q. Were you sick? A. Yes.

Q. Did you get a doctor's certificate?

A. Yes, he said he would give me one if I needed one.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Lupe Quijades.)

Q. Did you have an operation?

Mr. Babbage: I object to this line of questioning.

Mr. Janosco: Did I say——

The Witness: I had to go to Arizona that day that I was called to work.

Hearing Officer: The only part that is relevant here is what Florence said to her and what she said to Florence.

Q. (By Mr. Janosco): Why didn't you tell Florence you couldn't go to work?

Mr. Babbage: Now——

Q. (By Mr. Janosco): What did you tell Florence?

A. I told her I could not work nights. I didn't tell her exactly why, but I told her I was in the doctor's care.

Q. You were sick though?

A. Yes, I was.

* * *

Q. (By Mr. Janosco): Are you willing to go back to work for [112] Cal-Dates now?

A. Yes. [113]

* * *

General Counsel's Exhibit No. 2-KK—(Continued)

FLORENCE HAWKINS

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

Hearing Officer: Please mark this Board's Exhibit No. 6 for identification.

(Thereupon, the document above referred to was marked Board's Exhibit No. 6 for identification.)

Hearing Officer: This is a statement of Florence Hawkins dated the 9th day of March, 1954, taken by Mr. Irving Helbling.

Q. (By Hearing Officer): Is that the statement you made to [116] him? A. That is correct.

Q. Have you read that statement today?

A. No.

* * *

Q. (By Mr. Babbage): What is your occupation with the Date Growers' Association, Miss Hawkins?

A. Well, primarily I was distribution clerk. I was hired with the title of distribution clerk but starting this season, I took over the personnel work so I guess for this season, I have been both distribution clerk and payroll personnel

Q. In this personnel work, is it your responsibility to notify people when there is a shift beginning?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

A. That is correct.

Q. Did you notify the people who were to work at the beginning of the season in 1953?

A. Yes, I did.

Q. And how did you notify them?

A. I am told how many they wanted called in and then I go [117] down the seniority list and call them in.

Q. And do you go completely through the seniority list at the beginning of the season in 1953?

A. Yes.

Q. You did? A. Yes.

Q. And what did you do after you had completed the seniority list?

A. Then we use the new applications.

Q. When was the first night shift started in the 1953 season?

A. About the middle of October. I am not sure as to the date.

Q. Well, was it prior to the first of the year?

A. Yes.

Q. And how did you call the people for that shift? A. Well, just applications generally.

Q. How were you notified that there was to be a night shift?

A. Mr. Yowell would tell me. In this case, I think it was Mr. Yowell. It would either be Mr. Yowell or Fay Gillespie.

Q. Did he tell you how many employees it should be? A. Yes, he generally did.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

Q. Do you recall how many he told you for that occasion? A. Not offhand.

Q. Did you have any discussion with Fay Gillespie at that time with respect to any girls transferring from the day shift [118] to the night shift?

A. I was notified at the time to call them in, that there were two of them who were transferred from the day to the night.

Q. Do you recall the circumstances of the night shift of January 16th, 1954?

A. Yes, I was told about that.

Q. Who told you about that?

A. Mr. Yowell.

Q. Did he tell you how many employees you would need? A. Yes, seventeen.

Q. How many did he tell you?

A. I think it was around seventeen.

Q. On what basis did you notify employees for that shift?

In other words——

A. I went right down the seniority list.

Q. Was that the same seniority list that had been used in hiring the personnel from the beginning of the 1953 season? A. That is correct,

Q. And the people on that list who were not employed were people who had been out on strike?

A. Yes.

Q. And you made no deviation among them?

A. I went right down the list.

Q. Did you have any conversation with any of

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

the people that [119] you called regarding their seniority?

A. I cannot recall a single time when we discussed seniority.

Mr. Babbage: Excuse me. May I see the statement of Catherine White, please?

Q. (By Mr. Babbage): Do you know Catherine White? A. Yes.

Q. Was she one of the employees whom you called? A. Yes.

Q. Catherine White signed a statement in which appears: "On January 16, Florence of the personnel office called me and asked if I was available for the night shift."

Did you do that? A. Yes, I did.

Q. Then, the statement goes on to say: "I asked if I could work days."

Did she ask that? A. I think she did.

Q. "She said there wasn't any day work and told me to let her know."

Do you recall that?

A. Well, she was uncertain at the time as to whether she could accept the night work due to certain circumstances concerning the family and she was to call me back.

Q. It goes on to say, "I told her that I didn't want night shift work as she said I was to be a machine operator on the [120] night shift and also that the day shift employees had more seniority than I did."

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

A. No. In the first place, I never know what they are going to do out there because that isn't my job to know, so I would not have discussed other than that she was coming in, to my mind, or that she was to come in.

And, as I say, to my knowledge, she did not discuss seniority. We didn't discuss seniority. Her reasons that she gave me for not working the night shift had nothing to do with seniority.

As far as I understood, it was due to a family condition, and I don't recall anything about seniority being discussed. [121]

* * *

Cross-Examination

By Mr. Janosco:

Q. You are the personnel person for the company? A. That is correct.

Q. As the personnel representative, what are your duties?

A. Oh, I take applications and when they are hired, I make out the social security sheet and keep a record of that in a folder, and I call them in for work. I guess that is about the extent of it.

Q. Do you keep track of seniority lists?

A. I have done so, yes.

Q. Are you advised by the company to see to it that people are called according to seniority and placed on jobs according to seniority?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

A. That is what I was instructed to do when I took over my position in personnel.

Q. Well, why weren't the people placed on their proper [122] seniority list when they went back to work after the strike?

Mr. Babbage: I object to that question. It is asking for a conclusion of the witness.

Hearing Officer: That may all be true but if the witness understands the question, she may answer it in her own way.

The Witness: Well, as far as I was concerned, I went right down the seniority list. They were never removed from it, and I went right down the list.

Q. (By Mr. Janosco): Why didn't you place these people on the day shift according to their seniority? A. Pardon?

Q. Why didn't you place these people on the day shift according to their seniority?

A. Well, I called them in the order of seniority but I had never been advised what their status was. I had never made any change. I wasn't told where to place them. They had gone out from work and when they were called back in again, well, they came back in the order of seniority. No new list was ever made. [123]

* * *

Q. Did you advise anyone on that seniority list if they refused night work, that they would lose

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

their seniority? A. No, sir.

Q. Was there any notices of that type put on the bulletin board of the plant?

A. No, not to my knowledge.

Q. Was that a company policy?

A. That I couldn't say. [125]

* * *

Q. Now, when you went down this seniority list on January 16th, do you recall approximately how many people you called on the list?

A. I think I filled seventeen jobs.

Q. You filled seventeen jobs? And it seems——

A. I filled seventeen jobs and I think that I called between twenty and twenty-five or more.

Q. And when you got a reply that an individual wasn't interested, did you check them off?

A. Yes. Sometimes I do not always get them the first time. I generally leave a message and then they call me back. I try, wherever possible, to talk to the person direct but several of them had to call me back. I had left the message and they would call me back because I have made it a policy to do that.

Q. Were all these sixteen jobs filled from the seniority [126] list? I mean the seniority list which was established in connection with the union contract?

A. Oh, I would say that they must have been on it, I think.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of Florence Hawkins.)

Q. That is the list that Mr. Yowell handed to you?
A. Yes. [127]

* * *

JAMES F. WRIGHT

a witness recalled by and on behalf of the Employer, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Babbage:

Q. Directing your attention to the period after the termination of the strike in December, would you state whether or not any employees were employed after that date and prior to January 16, 1954?

A. Yes, we employed nine graders in the grading department.

Q. Were there any packers employed?

A. Not until we put on the night shift.

Q. Were those graders employed from the seniority list?
A. Yes, sir. [128]

* * *

Q. What is the company's position with respect to these employees who refused to accept work on the night shift on January 16th, 1954?

Are they still on the seniority list or will they have an opportunity to work again for the company?

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

A. When we start operation—our feeling on it—we will call back the people who worked on the night shift. We will continue to call the people on the list. When we exhaust that list, we will again offer these twelve people employment if they desire it. [132]

* * *

A. As I remember it, that is right.

Q. Would you state what it was?

A. Well, they asked about the day work and I said that the day crew was filled up and we were putting on a new type of Easter package which we were packing and we would have to work it at nights because of the equipment we had and the night job was the only one available.

And, too, that due to the reduced operation, we would not have the supervisors and the number of machine operators' jobs that we had had available, but I think I told them the machine operators' jobs that were available for those girls that had the experience, and that those girls that would have the experience in that, would have the job.

And then, they asked about the seniority and what that meant and I said, "Well, it would start when they started to work."

Q. Was this before or after she told you that she would not take the night shift?

A. Well, this was in the course of discussing the work.

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

Q. And had she told you whether or not she would accept the night shift?

A. Not yet. I think we discussed all these points before she arrived at a decision or an answer.

Q. Would you state also, was there anything further said about seniority at that time? [137]

A. Not to my knowledge. Just that one point. We didn't go into detail on it.

Mr. Babbage: May I have the statement of Mrs. Warren?

Q. (By Mr. Babbage): I am reading from a statement which was signed by Mrs. Beryl Warren in which she said she discussed having come to the plant office and talked to Florence and Florence having told her that there was no day shift work available.

Then, she goes on to say, "I then went to the plant and talked to Mr. Yowell. He said I would have to work on the line. That there was about four weeks work and that would be all. I asked him if I could get day shift work when the night work was over. He said no because the day girls had seniority and I would have to wait until I was called."

Is that a correct statement of what you said at that time?

A. Well, I don't remember whether I used the word "seniority" at that time or not. I know we discussed the fact that the day crew was already established and as we had no other day crew work,

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

the night work was the only work available and the girls that were working here, were the ones that were given first choice.

Q. She goes on to say: "I told him I didn't want night work and he wouldn't respect me if I did. He said my seniority would start from the time I next came to work." [138]

Q. Did you say that to her after she refused to accept night work or before?

A. I think those were about our parting words as she backed out of the parking lot.

Q. Did you have a discussion with any other employees about seniority, Mr. Yowell?

A. Pauline Skinner was with Beryl Warren at the same time.

Q. Was there anyone else? A. No.

Mr. Babbage: That is all. [139]

Cross-Examination

* * *

By Mr. Janosco:

Q. Did you instruct any of the people who are under you in supervision, to advise the people that they would lose their seniority if they refused to come back to work on a night shift?

A. The only person I talked to was Florence Hawkins in procuring the help.

Q. Were any orders given to notify the people

General Counsel's Exhibit No. 2-KK—(Continued)
(Testimony of James F. Wright.)

that if they refused night work they would lose their seniority?

A. No, the orders I gave to Florence were to call the people in accordance with the seniority list and those that she could contact, to have them report to the personnel office and then make contact with me and I would tell them what their position was. [140]

That there was a night shift and the reason why and the duration because it has been our practice in the past that our employees had a pretty good idea of what the work was going to be and how long it would last. Some of them like to know that. [141]

* * *

GENERAL COUNSEL'S EXHIBIT No. 2-UU

[Title of Board and Cause.]

NOTICE TO SHOW CAUSE

On December 9, 1953, California Date Growers Association of Indio, California, filed a petition for certification in the above-entitled matter pursuant to Section 9 (a) of the National Labor Relations Act.

Thereafter, on September 20, 1954, District #5, United Packinghouse Workers of America, CIO,

acting for and on behalf of its Local No. 78, filed a motion with the undersigned to correct name of the Union by substituting the name "United Packinghouse Workers of America, Local 78, CIO" in place and stead of "United Fresh Fruit & Vegetable Workers LIU #78, CIO" in all documents relating to this proceeding. Copies of said motion were served on all parties.

Notice Is Hereby Given that unless sufficient cause to the contrary be shown in writing, filed with the undersigned in Los Angeles, on or before October 4, 1954, (with affidavit of due service of copies upon the parties to this proceeding), the undersigned will grant the aforesaid motion by substituting the name "United Packinghouse Workers of America, Local 78, CIO," in place and stead of the name "United Fresh Fruit & Vegetable Workers LIU #78, CIO," therein.

Dated, Los Angeles, California, September 22, 1954.

/s/ GEO. A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-First Region.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-WW

[Title of Board and Cause.]

ORDER GRANTING MOTION

On September 22, 1954, the undersigned issued a Notice to Show Cause why he should not grant the Motion of District #5, United Packinghouse Workers of America, CIO, acting for and on behalf of its Local No. 78, requesting that its name be substituted in place and stead of "United Fresh Fruit & Vegetable Workers, LIU #78, CIO" in all documents relating to this proceeding, and no response having been filed thereto,

It Is Hereby Ordered that the said Motion be, and it hereby is, granted; and

It Is Further Ordered that the name "United Packinghouse Workers of America, Local 78, CIO" be, and it hereby is, substituted for the name "United Fresh Fruit & Vegetable Workers, LIU #78, CIO" in the aforesaid proceedings wherever it appears therein.

Dated at Los Angeles, California, this 4th day of October, 1954.

/s/ GEO. A. YAGER,

Acting Regional Director, National Labor Relations
Board, Twenty-First Region.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-YY

[Title of Board and Cause.]

SUPPLEMENTAL REPORT
ON CHALLENGES

On March 24, 1954, the Regional Director issued a Report on Challenges to the ballots of:

Carrillo, Manuela
Chester, Ellen
Dallosta, Lucretia
Fieber, Lillian
Flores, Florence
Gagnon, Anna
Quijadas, Lupe
Romero, Socorro
Ruby, Mayme
Skinner, Pauline
Warren, Beryl
White, Catherine

Thereafter the Employer filed objections to the Report on Challenges asserting that the Regional Director erroneously resolved the challenges. As it appeared that the objections to the Report on Challenges raised substantial and material issues, an order directing a hearing on challenges was issued. Pursuant thereto a hearing was held before George H. O'Brien, Hearing Officer, on April 29, 1954. During the hearing all parties were given the opportunity to examine and cross-examine witnesses and to present other evidence relevant to the in-

General Counsel's Exhibit No. 2-YY—(Continued)
quiry. Thereafter, the Employer and the Petitioner
filed briefs with the undersigned urging their re-
spective positions.

The undersigned has carefully considered all of
the evidence and the briefs of the parties. Upon
the entire record the undersigned makes the follow-
ing findings and determination:

The Employer's operations are seasonal. Prior to
November, 1952, the Employer maintained a pri-
ority list of persons for employment in each season.
The names of competent employees of the previous
season comprised the list. They were offered employ-
ment during the new season. If an employee worked
on the night shift or had been willing to work short
weeks or during the hot weather, he was given a
preferential place on the list. As a result he would
be called to work sooner at the beginning of the
next season, or he was retained longer at the end of
the season. In addition, employees by accepting such
work might secure the opportunity of receiving a
better job.

In November of 1952, pursuant to an agreement
with the petitioning Union, a seniority list was
established which governed employment. They were
called to work in the order in which their names
appeared on the list.

Around the first of December, 1953, a strike oc-
curred among the company's employees which ter-
minated on or about December 8, 1953, when most

General Counsel's Exhibit No. 2-YY—(Continued)
of the strikers unconditionally applied for reinstatement. They did so by registering for employment with the Company.

Each of the persons listed above who had cast a challenged ballot had status on the 1953 seniority list. Each was a striker and each unconditionally applied for reinstatement. At the time of the application for reinstatement there was insufficient work to permit recall of all the strikers. However, shortly thereafter, the Company re-employed, from the seniority list, seven to ten of the strikers for jobs on the day shift.

On January 16, 1954, the Company inaugurated a night shift which required the employment of approximately 17 persons. The Company offered this employment to the employees herein involved. Each of them declined this offer of employment for various personal reasons. Several of them asked about the possibility of employment on the day shift but were told no such employment was available. Because of the refusal of these employees to accept this night shift work, the Company contends that they have quit their employment and therefore were not eligible to cast ballots during the election. The Union, on the other hand, urges that employees were merely declining night shift work, which declination did not affect their status.

The record reveals that each season employees filled out new applications for employment. The applications contained a question as to whether the

General Counsel's Exhibit No. 2-YY—(Continued)
employee is willing to accept night shift work. Many employees answer this question either affirmatively or negatively, while others make no answer. On the record as a whole, the undersigned finds that each season at the beginning of the night shift supervisors offered night shift employment to employees on their crews. Many of the employees refused to accept work on the night shift. The employees were free to reject work on the night shift and were not penalized for such a rejection. Prior to the establishment of the seniority list, employees who accepted night work might have received preference in employment during the next season over those who had not done so, or they may have secured promotions to higher paying classifications or they may otherwise have benefited, but the evidence is clear that the employees who rejected night work suffered no loss of pay, declassifications or other penalty for such refusal and were not regarded as having quit. In addition, many of the employees stated in their applications that they would not accept night shift work. Because of their statement, they were not deprived of opportunity to work on the day shift.

The Agreement for Consent Election herein, approved February 5, 1954, makes provision for eligibility of voters. It provides, in part:

“Those eligible to vote shall be persons who were employed in the bargaining unit—during the last complete payroll period in January,

General Counsel's Exhibit No. 2-YY—(Continued)

1954, and including all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election.”

The record as a whole discloses that the Company does not claim that these employees were discharged so as to result in excluding them from eligibility to vote. The General Manager of the Company testified that the Company did not discharge them.

On the other hand, the Company takes the position that by refusing to accept night work, these employees “quit.”

In view of past practices, custom and the intent of the employees as revealed by the record as a whole, the undersigned can find no support for the position of the Company.

The record does not reveal any word or act on the part of any of these employees which establishes an intent to resign from and abandon their employment status. Rather, the record reveals that while rejecting the offer of night work some were simultaneously seeking day work.

The provisions of the Agreement for Consent Election are controlling here. If the employees on the seniority list neither were discharged nor quit,

General Counsel's Exhibit No. 2-YY—(Continued)
they are eligible to vote. They were not discharged.
They did not "quit."

Likewise, the undersigned finds no merit to the Company's contention that employees Mayme Ruby and Lupe Quijadas severed their employment since they did not report for work because of illness. They had failed to obtain leaves of absence. Neither of these employees was ever told that she was discharged. The record reveals no credible evidence that employees while laid off, with no real expectation of being recalled for a period of six or more months, are required to obtain leaves of absence or sick leave during such lay-off period.

Ruby began working for the Company in 1943. She was working when the strike began and went out on strike. After the termination of the strike she signed the availability list. Later, when called from the Company's office to return to work, she told them she was sick and not able to work. When she called back later and said she wanted to return to work, they told her not that she was discharged or had quit but that they then had no place for her.

Quijadas had worked for the Company 3 years. She went out on strike and, when it was terminated, signed the availability list. She, too, was ill when called to return to work. She told the Company she was under the doctor's care when requested to return to work.

The record as a whole reveals nothing in either the words or conduct of these employees or of the

General Counsel's Exhibit No. 2-YY—(Continued)
Company which would substantiate a finding that
either of these employees quit or was discharged.

It is the finding of the undersigned that the evidence, when considered as a whole, establishes that all of these employees were eligible to vote in the February 18, 1954, election, under the terms of the Agreement for Consent Election.

The undersigned overrules the challenges to the ballots of these 12 employees and directs that they be opened and counted, at the Twenty-First Regional Office of the National Labor Relations Board, 111 West Seventh Street, Los Angeles 14, California, Monday, October 11, 1954, at 2:00 p.m.

Dated at Los Angeles, California, this 5th day of October, 1954.

/s/ GEO. A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-First Region.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-ZZ

October 5, 1954
PROspect 4711, Sta. 838

Mr. John D. Babbage,
Best, Best & Krieger,
Evans Bldg.,
Riverside, California.

Re: California Date Growers Association,
Case No. 21-RM-280

Dear Mr. Babbage:

A conference is scheduled to be held in this office at 2:00 p.m., October 11, 1954, for the purpose of opening and counting the ballots of those persons found to be eligible by the Regional Director. I trust that this time is convenient to you.

We are sending a copy of this letter to the petitioning union to serve as its invitation to attend the conference.

Very truly yours,

IRVING HELBLING,
Field Examiner.

cc: United Packinghouse Workers of
America, CIO,
1019 So. Grand Avenue,
Los Angeles, California.

California Date Growers Association,
Corner Highway 99 and King Street,
Indio, California.

IH/ehm

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-AAA

October 8, 1954

PProspect 4711, Sta. 838

Mr. John D. Babbage,
Best, Best & Krieger,
Evans Bldg.,
Riverside, California.

Re: California Date Growers Association,
Case No. 21-RM-280

Dear Mr. Babbage:

In accordance with our telephone conversation of yesterday, the conference scheduled in this matter has been postponed until 2:00 p.m. Tuesday, October 19, 1954.

Very truly yours,

IRVING HELBLING,
Field Examiner.

cc: California Date Growers Ass'n.,
Corner Highway 99 and King Street,
Indio, California.

United Packinghouse Workers of
America, CIO,
1019 So. Grand Avenue,
Los Angeles, California.

IH/ehm

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-BBB

Best, Best & Krieger
Attorneys at Law
Evans Building
Riverside, California
Telephone 598

October 13, 1954.

Special Delivery

Mr. Irving Helbling, Field Examiner,
National Labor Relations Board,
111 West 7th Street,
Los Angeles 14, California.

Re: California Date Growers Association,
Case No. 21-RM-280

Dear Mr. Helbling:

Since my conversation by telephone with you last week in which we arranged for a continuance to October 11, 1954, for the purpose of opening and counting the ballots, I have been advised that the employer desires to raise a formal objection as to the Regional Director's decision with respect to the 12 challenges which have heretofore been considered.

I have explained to the employer that this action by the Regional Director is discretionary and that in my present opinion no direct appeal can be made to the Board in Washington or to the courts. The

question arises, however, as to the status of the employer in the event some statement of his position is not made of record prior to the counting of the ballots. I tried to reach you by telephone today to discuss this subject, but am writing you this letter in order that you may give it some consideration so that we may discuss it by phone at an early opportunity.

If the Union's representative would have no particular objection, I would like to have another week to work out this problem with the employer for the counting of the ballots and I am hopeful that that might be arranged.

Thanking you for your co-operation, I remain.

Very truly yours,

/s/ J. D. BABBAGE.

JDB:ab

cc: Calif. Date Growers Assn.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-CCC

PRospect 4711

Ext. 838

October 14, 1954.

John D. Babbage, Esquire,
Best, Best & Krieger,
Attorneys at Law,
Evans Building,
Riverside, California.

Re: California Date Growers Association
Case No. 21-RM-280

Dear Mr. Babbage:

I have discussed with Acting Regional Director Yager your letter of October 13, 1954, in regard to a further postponement of the ballot count in this matter.

As you know, the consent election agreement provides that the Regional Director's findings on challenges and objections shall be final and binding and all the precedents in regard to this question have been to sustain this position unless the Regional Director acts in a capricious manner.

The Union is urging a speedy resolution of the situation and as it has been pending for a great length of time, and particularly in view of the continuance already granted you, Mr. Yager feels that

any further request for a continuance must be denied.

As you know, I will not be in town on October 19. Mr. Carl Abrams of this office will conduct the conference scheduled for 2:00 p.m. on that day.

Very truly yours,

IRVING HELBLING,
Field Examiner.

cc: California Date Growers Ass'n.,
Corner Highway 99 and King St.,
Indio, California.
Arthur Morrison, Director,
United Packinghouse Workers of
America, CIO,
1010 South Grand Avenue,
Los Angeles, California.

IH:plk

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-DDD

Best, Best & Krieger
Attorneys at Law
Evans Building
Riverside, California
Telephone 598

October 19, 1954.

Mr. George A. Yager,
Acting Regional Director,
National Labor Relations Board,
111 West 7th Street,
Los Angeles 14, California.

Attention: Mr. Irving Helbling, Field Examiner.

In re: Calif. Date Growers Assn.,
Case No. 21-RM-280

Dear Sir:

This will acknowledge your letter of October 14, 1954.

Please be advised that on behalf of the California Date Growers Association we object to the findings on challenges. The appearance by a representative of the employer at your offices on October 19, 1954, at 2:00 p.m. pursuant to your order that the challenged ballots shall be opened and counted should not be regarded as a waiver by the employer of the employer's objections to the challenges.

Very truly yours,

/s/ J. D. BABBAGE.

JDB:ab

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-EEE

United States of America
National Labor Relations Board
Case No. 21-RM-280

In the Matter of
CALIFORNIA DATE GROWERS ASS'N
(Employer and Petitioner.)
and
UNITED PACKINGHOUSE WORKERS
OF AMERICA, CIO
(Union.)

Date Issued October 19, 1954

Type of election: Consent.

REVISED TALLY OF BALLOTS
(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the Regional Director on October 5, 1954, and the addition of these ballots to the original Tally of Ballots, executed on February 18, 1954, were as follows:

	Original Tally	Challenged Counted	Final Tally
Approximate number of eligible voters	182		
Void ballots	0	0	0
Votes cast for: United Packinghouse Workers of America, CIO	69	13	82
Votes cast against participating labor organization	70	8	78
Valid votes counted	139	21	160
		s/FCB	
Unopened challenged ballots	65	0 s/CA	0

A majority of the 160 valid votes has been cast for United Packinghouse Workers of America, CIO.

For the Regional Director,

/s/ CARL ABRAMS,

/s/ FLOYD C. BREWER.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the final tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For California Date Growers Association.

10-19-54 Copy forwarded to Company by registered mail.

10-19-54 Copy forwarded to Best, Best & Krieger, Attorneys for Company, by ordinary mail.

For UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO.

/s/ JOHN JANOSCO.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-GGG

United States of America
National Labor Relations Board

Case No. 21-RM-280

In the Matter of

CALIFORNIA DATE GROWERS ASSOCIA-
TION

(Employer and Petitioner.)

and

UNITED PACKINGHOUSE WORKERS OF
AMERICA, LOCAL 78, CIO

(Union.)

CERTIFICATION OF REPRESENTATIVES

Pursuant to the terms and provisions of the Agreement for Consent Election entered into by and between the parties in the above-entitled matter, the undersigned Regional Director of the National Labor Relations Board conducted an election by secret ballot as therein provided. No objections were filed to the Tally of Ballots furnished to the parties, or to the conduct of the election.

Pursuant to authority vested in the undersigned by the Agreement for Consent Election and by the National Labor Relations Board, it is hereby certified that a majority of the valid ballots has been cast for United Packinghouse Workers of America, Local 78, CIO, and that pursuant to Section 9 (a) of the National Labor Relations Act said organization is the exclusive representative of all the em-

ployees in the unit defined in the Agreement for Consent Election for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Los Angeles, California, on the 21st day of October, 1954.

On behalf of

NATIONAL LABOR RELATIONS BOARD,

/s/ GEO. A. YAGER,

Acting Regional Director for Twenty-First Region
National Labor Relations Board.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-HHH

Best, Best & Krieger
Attorneys at Law
Evans Building
Riverside, California
Telephone 598

October 25, 1954.

Mr. George A. Yager,
Acting Regional Director,
National Labor Relations Board,
111 West Seventh Street,
Los Angeles 14, California.

Re: Objections to revised tally of ballots,
California Date Growers Assn., Employer;
United Packinghouse Workers of America, (Union).

Dear Mr. Yager:

I enclose herewith four copies of "Objections to Conduct Affecting the Results of the Election" in the above-captioned case.

Your record will show that a revised tally was issued on October 19, 1954. No person representing the California Date Growers Association was present at the counting, tabulating and compilation of the ballots, although Mr. James Wright, General Manager of the California Date Growers Association, was present in the reception room before the time set for the counting of the ballots and during the entire period that the ballots were being counted.

Your file will also reflect that the certification of representatives was sent out by your office on the 21st day of October, 1954, only two days after the revised tally was issued. I know of no rule or regulation of the National Labor Relations Board providing for certification of representatives within a two day period after the issuance of a revised tally of ballots.

Very truly yours,

/s/ J. D. BABBAGE.

JDB:ab

Encl.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-III

[Title of Board and Cause.]

OBJECTIONS TO CONDUCT AFFECTING
RESULTS OF ELECTION

The California Date Growers Association, Employer and Petitioner, objects to conduct affecting the results of an election for the following reasons:

1. The time set by the Regional Director for the ballot count was 2:00 p.m., October 19, 1954. At that time Mr. James Wright, General Manager of the California Date Growers Association, was present at the reception desk at the Regional Office of the National Labor Relations Board; notwithstanding the presence of Mr. James Wright at said office, the counting, tabulating and compilation of the ballots in the above-captioned matter was performed by one or more Field Examiners of the National Labor Relations Board, and John Janosco, representing the United Packinghouse Workers of America, CIO, and no one was present representing the Employer.

2. The revised tally of ballots was not served on the Employer until October 20, 1954, yet on October 21, 1954, a certification of representatives was issued by the Regional Director for the Twenty-first Region of the National Labor Relations Board pursuant to the revised tally hereinabove mentioned.

Wherefore, Employer objects to conduct affecting the results of the election on the grounds that said

Employer was not represented at the counting, tabulating and compilation of the ballots; that said Employer was not represented because of the failure of the National Labor Relations Board, its agents and employees, to admit the representative of the Employer to the room where the ballot counting was being handled or to notify him that such ballot counting was going to take place; that said failure to so notify the said representative of the Employer was arbitrary, capricious and unreasonable.

BEST, BEST & KRIEGER,

By /s/ J. D. BABBAGE.

Attorneys for Employer and
Petitioner.

Admitted in evidence January 9, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2-JJJ

PRospect 4711
October 27, 1954.

Best, Best & Krieger, Esquires,
Evans Building,
Riverside, California.

Att: John D. Babbage, Esquire.

Re: California Date Growers Association,
Case No. 21-RM-280

General Counsel's Exhibit No. 2-JJJ—(Continued)

Gentlemen:

This will acknowledge your letter of October 25, together with four copies of a document entitled "Objections to Conduct Affecting the Results of the Election."

For your information, there is no provision in either a consent election agreement or the Board's Rules and Regulations for the filing of a document of this nature after the issuance of a Revised Tally of Ballots. All the issues relating to the challenged ballots, the counting of which made necessary the issuance of the Revised Tally of Ballots, were finally resolved by our issuance of the Supplemental Report on Challenges in this matter on October 5, 1954. It is standard practice, where challenges are overruled in sufficient number to make their count necessary, for the Regional Director to set a time and place and notify the parties thereof. At the time of the count, a Revised Tally of Ballots is prepared and served on the parties. In consent cases, the appropriate certification may be issued immediately.

As to the failure of you or your client to be present at the time the ballots were counted, you will recall that the Supplemental Report on Challenges designated October 11, 1954, at 2:00 p.m. at this office as the time and place for the counting of these ballots. Subsequently, on October 13, 1954, you requested an additional week before the count was made. On October 14, Field Examiner Helbling ad-

General Counsel's Exhibit No. 2-JJJ—(Continued) dressed a letter to you in which he indicated, among other things, that the count of the challenged ballots would be put over until 2:00 p.m., October 19, 1954, at this office. He also pointed out that Field Examiner Carl Abrams would, in his absence, conduct the conference. On October 19, you addressed a letter to me, in which you stated, in part, that the appearance by a representative of the Employer at our offices on October 19, 1954, at 2:00 p.m., pursuant to our order that the challenged ballots be opened and counted, should not be regarded as a waiver by the Employer of his objections to the challenges.

From the personnel in this office who were involved in the matter, I learned that the union representative arrived at approximately 1:50 p.m. to be present for the purpose of observing the count; that at approximately 2:05 p.m., Mr. Abrams asked the union representative to agree to a delay until 2:15 p.m., with the understanding that, if at that time no representative of the Company had appeared, the ballots would be opened. The union representative agreed to this. At 2:15 p.m., no person had appeared and asked for Mr. Abrams or identified himself in connection with this case. Mr. Abrams then inquired at the reception desk for you and was advised that you had not yet arrived. It appears that a gentleman did appear at the reception desk at approximately 1:45 p.m. and informed the receptionist that he was to meet you here. He inquired if you had arrived and was ad-

General Counsel's Exhibit No. 2-JJJ—(Continued)
vised that you had not. He did not state to our receptionist his name or that it was a Labor Board matter with respect to which he was meeting you here. Mr. Abrams, upon being informed by the receptionist that you were not here, asked a second Field Examiner to witness the opening and counting of the ballots, which was then done in your absence.

It appears that, shortly after 2:30 p.m., you appeared and were informed by the receptionist that there was a gentleman waiting for you; that you, together with the other person, presumably Mr. Wright of the Company, then walked out of the office. In the interim, Mr. Abrams completed the count. Upon being advised by the receptionist that you had just arrived and stepped out with someone, Mr. Abrams, upon your return, explained to you the above facts and displayed the ballots to you as well as the tallies.

It is my position that this office did everything possible to suit your convenience in connection with the counting of the challenged ballots and the issuance of the revised tally. It is regrettable that the gentlemen representing the Company did not identify himself further than to state that he was awaiting your arrival. I think you will appreciate that our receptionist could not be expected to know whom either you or the unidentified gentleman wanted to see unless you asked for the staff member by name or identified the case with respect to which you were present. We, of course, regret that it was necessary to count these ballots in your absence.

General Counsel's Exhibit No. 2-JJJ—(Continued)
However, under the circumstances, I do not believe that it can be said that any of our personnel acted in an arbitrary manner.

Very truly yours,

GEORGE A. YAGER,
Acting Regional Director.

GAY:md

Admitted in evidence January 9, 1956.

FLORENCE E. HAWKINS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Brien:

* * *

Q. By whom are you employed?

A. California Date Growers Association.

Q. In what capacity?

A. In charge of the payroll and personnel department.

Q. How long have you held that position?

A. For about two years.

Q. Now, "about" could be important in this. Did you assume [15] those duties before the date packing season began in August of 1953?

A. Yes.

(Testimony of Florence E. Hawkins.)

Q. Do you recall how long before?

A. Well, the reason——

Trial Examiner: Just take your time. Give it whatever thought you need to in order to answer.

The Witness: Well, actually, I believe I assumed those duties about the beginning of the season in '53.

Q. (By Mr. O'Brien): Had you worked for the Association before that time? A. Yes.

Q. Approximately how long have you worked for the Association? A. Three years.

Q. And what were your duties prior to August of 1953?

A. I was distribution clerk. I guess that is the closest. You can call it that.

Q. Can you tell us what your duties were as distribution clerk?

A. Well, primarily I was hired to recap the payroll cards and enter and recap packing reports and tie them together as to the total packing——

Q. In other words, you were hired to straighten out the records? A. Keep track of them. [16]

Q. Coming back to August of 1953, who was your immediate superior at that time?

A. Mrs. Yowell.

Q. What was her title?

A. She was office manager.

Q. Is she any relation to Mr. Yowell?

A. She is his wife.

Q. And Mr. Yowell—what is his position?

A. Plant superintendent.

(Testimony of Florence E. Hawkins.)

Q. Has been for a great many years, has he not?

A. I think so.

Q. And to whom was Mrs. Yowell responsible?

A. Mr. Wright, I would say.

Q. That is Mr. Wright sitting over here?

A. Yes, sir.

Q. What is his title? A. General manager.

Q. In August of 1953, did you have anything to do with recalling workers for the begining of the date season? A. Yes.

Q. Did you receive instructions from someone as to what you should do? A. Yes.

Q. From whom? A. Mr. Yowell. [17]

Q. From Mr. Yowell. What were his instructions?

A. Well, I can't say when we started taking applications, but we start taking applications first, and then when they are ready to start operation. I am given instructions to call in employees as they are needed. We have a new application every year. I mean we don't go by the supposition that once a person has worked there that we just automatically use that. We have a new application from our employees every year.

Q. Well, there is always a period in the summer when—at least, during the three years you have been there, the three summers you have been there, there has been a period when there was no date packing going on? A. Little or none.

Q. So when employees are laid off in the spring,

(Testimony of Florence E. Hawkins.)

so far as you know, they are not given any specific instructions as to when they can report in the fall?

A. No.

Q. Now, the reason I am asking you to concentrate, if you can, on the fall of 1953, is because the fall of 1953, '54 and '55, may be different, and if there are any differences, we want to know what they are. Since '53, was the first time that you had anything to do with it, it should be fairly clear in your mind. Do you follow me? A. Yes, sir.

Q. Then, sometime in 1953, did you do anything about [18] inviting applications to work?

A. Yes. We sent out a letter advising them approximately when we were going to start operation and scheduling a time when we would like them to come in to put in their applications.

Q. Were those individual letters?

A. Well, they were form letters and sent out individually.

Q. It was a form letter? A. Yes.

Q. And they were mailed to individuals?

A. Yes, sir.

Q. How did you select the names of the people who would get those letters?

A. I went down the list, the seniority list we had.

Q. You had a seniority list? A. Yes, sir.

Q. Had you prepared the seniority list yourself?

A. Yes, I did.

Q. I show you a document which has been filed as General Counsel's Exhibit 2-O. Now, that is the document which was used as a portion of the voting

(Continuation of Transcript of Hearings.)

It is the best evidence available. There have probably been other checks indicating that the individual would not. I am not sure when the real check marks indicate, but only from these particular check marks and these real check marks, is the balance of this year typical?

A. Under this it might be [25].

Q. Is that the summary for which you sent when you sent me letters in September or September or August of 1951?

A. Well, no, I don't know whether this is the summary for, but it probably contains the summary that came in the box that I sent.

Q. That is, you think this box was received from the box which you sent in August or September?

A. Probably, yes, sir.

Q. Would you have that original box available separately, or would it be something that has been destroyed? A. No, I would have to check.

Q. Anyway, your present recollection is that this General Counsel's Exhibit 241 was prepared from a different box? A. Yes, sir.

Q. Now, in preparing the original summary for, what source material did you use?

A. I used all their findings and all the information that I could find on their employment records with us.

Q. Did that mean that you sent out a letter to everyone who had ever worked for the Association?

A. No, sir. I thought you asked me how I completed the box.

(Testimony of Florence E. Hawkins.)

Q. I see. What have the past elections did you use the pasting names on the list?

A. In connection with the—the list that I am referring to is the first voluntary list I guess that we had under the [195] union contract. I completed it, and as I say, no additions were believed as it according to the agreement, and as far as that was in the contract. That is when I went up their records. That was made up in November of '52. I believe, that that was used as our list of employees, as I said that when I went out the notice to the people the following fall.

Q. Did you use the November, 1952, list—did you send out notices to employees whose name was on that?

A. Providing they had not quit in the meantime.

Q. Let's see if I get the straight. What you did, you took the November, 1952, list which was had prepared—you prepared the November, 1952, list?

A. Yes, sir.

Q. You took that and then as you came to a name on that list, you saw whether or not they had quit?

A. I tried to keep the list up as late as I could when were no longer there. But, there were additions made. If they had worked it would in that way, they were added to the original list.

Q. This list wasn't any other thing, that is the voluntary—

A. It was—I understood that it was to be kept up as late.

(Testimony of Florence E. Hawkins.)

list in the last consent election. These little penciled check marks indicate that the individual voted, and I am not sure what the red check marks indicate, but aside from these penciled check marks and these red check marks, is the balance of that your typing?

A. Looks like it might be. [19]

Q. Is that the seniority list which you used when you sent out letters to employees in September or August, of 1953?

A. Well, sir, I don't know whether that is the specific list, but it probably contains the names that were on the list that I used.

Q. That is, you think this list was copied from the list which you used in August or September?

A. Probably, yes, sir.

Q. Would you have that original list available anywhere, or would it be something that has been destroyed?

A. No, I would have to check.

Q. Anyway, your present recollection is that this General Counsel's Exhibit 2-O was prepared from a different list?

A. Yes, sir.

Q. Now, in preparing the original seniority list, what source material did you use?

A. I used all their folders and all the information I could find on their employment records with us.

Q. Did that mean that you sent out a letter to everyone who had ever worked for the Association?

A. No, sir. I thought you asked me how I compiled the list.

(Testimony of Florence E. Hawkins.)

Q. I see. What basis for your selection did you use for putting names on the list?

A. In accordance with the—the list that I am referring to is the first seniority list I guess that we had under the [20] union contract. I compiled it, and, as I say, to ascertain who belonged on it according to the agreement, and so forth, that was in the contract. That is when I went by their records. That was made up in November of '52, I believe, then that was used as our list of employees, so I used that when I sent out the notices to the people the following fall.

Q. Did you use the November, 1952, list—did you send out notices to everyone whose name was on that?

A. Providing they had not quit in the meantime.

Q. Let's see if I get this straight. What you did, you took the November, 1952, list which you had prepared—you prepared the November, 1952, list?

A. Yes, sir.

Q. You took that, and then as you came to a name on that list, you saw whether or not they had quit?

A. I tried to keep the list up to date as to those who were no longer there. Also, there were additions made. If they had worked 12 weeks in that season, they were added to the original list.

Q. This list wasn't any static thing, then? It was something——

A. It was—I understood that it was to be kept up to date.

(Testimony of Florence E. Hawkins.)

Q. Do you know whether any seniority list was ever posted in the packing shed?

A. Yes, sir. A copy of that list was posted. [21]

Q. Do you know whether it was in November—strike that. Do you know whether it was the November, 1952, list or this list which was used at the election?

A. It would have been the '52 list.

Q. Do you know during what period of time that was posted?

A. Well, it was posted as soon after as I had completed it, a copy was posted. How long it was up there, I don't know. I mean I have no—it possibly could still be up there.

Q. That is, it was posted some time in November of 1952?

Trial Examiner: 1952?

The Witness: Yes.

Mr. O'Brien: Yes. That date is right.

Q. (By Mr. O'Brien): Then you had one copy in your own office in which you made changes, but do you know of any changes that were made on the posted seniority list?

A. Yes, sir. I tried to keep those up to date, also.

Q. Do you know when operations stopped in the spring of 1953?

A. No, sir, I don't.

Q. Well, whenever it was, the people whose names still appeared on this posted seniority list in the spring of 1953, would be the ones that received letters in the fall of 1953, when you started operations?

A. That's right.

Q. There might have been some mistake, but that

(Testimony of Florence E. Hawkins.)

was your aim? A. Yes, sir. [22]

Q. Did you send letters to anyone else besides the corrected seniority list?

A. Well, until the season was over, I didn't know until I had figured back how many had acquired the 12 weeks which constituted seniority, so I sent to those also, but I doubt that they were on the list out in the plant at that time.

* * *

Q. (By Mr. O'Brien): Then your aim in August, or September, of 1953, was to send an individual letter to every person whose name appeared on the seniority—posted seniority list, and [23] also to persons whose names did not appear on the posted list but had worked long enough during the—had worked a specific number of weeks during the '52-'53 season? A. That is right.

Q. My next question was whether that exhausted the names of people who received special letters from you in '53?

A. May I say I don't remember whether—I can't remember at this time whether I then sent these notices to those who I had listed working that hadn't worked the required 12 weeks or not. I'm not sure now whether I did or not.

Q. Well, at any rate, as far as the people to whom you sent letters, were there enough of them to keep your date operation going, or did you need additional employees?

A. I needed additional ones.

(Testimony of Florence E. Hawkins.)

Q. And how did you go about getting them?

A. Well, once it is known that we are taking applications, then people come in and put in their applications, so I usually have a backlog of applications, and then when I have exhausted the list for calling them in, I call in all these people who are not on our list.

Q. I think you said you required a new application every fall? A. Yes.

Q. From each person. And that would be true even though this same person had been working year after year for 10 or 15 years? [24]

A. That is correct. [25]

* * *

Q. Did you start a night shift in October of 1953, do you happen to recall? [26]

A. Since we started the night shift every year I have been there, I rather imagine we did.

Q. Well, the date isn't too important, but I wondered if you recalled anything of the circumstances of starting a night shift before the strike in 1953?

A. Well, the usual procedure when we were going to start a night shift, I was notified that we would be starting on such and such a date and to count on having so many people in on that particular date.

Q. Those instructions came from Mr. Yowell?

A. Yes, sir.

Q. And how did you go about staffing the night shift?

A. Well, I usually check the applications of those

(Testimony of Florence E. Hawkins.)

who requested night work only. Some applications they couldn't work days. So I usually specified on the back that they wanted night work only, so I took those first to determine how many I had of those and how many were still available for work and would work, and then I took all the rest of them and just tried from there.

Q. Were those applications of people who were working days at the time?

A. No. I am speaking specifically of those who weren't at that time employed at California Date Growers.

Q. Assuming that this night shift—that there was a night shift in the fall of 1953, before the strike started, and [27] assuming that it happened in October, you don't think that you offered night work to any of the day workers at that time?

A. The procedure at California Date is: That is determined in the back in the packing department, then I am informed as to the difference required to make up that shift. In calling in people—any transfer that is made for people who are switching from days to nights is done in the plant, and then I am notified of the additional people we need.

Q. So there may have been some changes made by Mr. Yowell out in the plant, and he tells you for your bookkeeping purposes that they have changed from one shift to another?

A. That's right.

Q. But as far as your getting new employees is

(Testimony of Florence E. Hawkins.)

concerned, he just tells you the number of packers he wants, or graders——

A. That means in addition to the ones who were currently working.

Q. And for that you looked only to applications filed during the current season of people who were not then working? A. That's right.

Q. Did the plant operate during the strike?

A. Yes, sir.

Q. Were grading operations conducted during the strike? A. Yes, sir.

Q. Packing operations? A. Yes, sir. [28]

Q. Was there any operation that was completely suspended during the strike, that you know of?

A. I don't remember that there was.

Q. And during the strike did you make any effort to secure replacements for the strikers?

A. Yes, sir.

Q. What effort did you make, or what did you do?

A. Took applications for people coming in asking for work.

Q. Did you go back over the applications which you had on file? A. I don't remember.

Q. But you received applications for new employment? A. Yes.

Q. And you put these people to work?

A. Yes, sir.

Q. Do you know of anything of a newspaper ad that was placed in the paper during that strike offering employment to strikers? A. No, I don't.

(Testimony of Florence E. Hawkins.)

Q. Were you present when a group of strikers returned to work with their representatives, Mr. Smith and Mr. Moorehead?

A. When they came in to sign availability for work.

Q. That is what I think I have in mind. I'm not sure. I wasn't there.

A. Yes. I was. [29]

Q. Well, you tell us about it, this availability for work.

A. Well, we understood that they were coming in to sign up that they were ready to go back to work, and we had a list, just a sheet of paper, and they came up to the window and signed their names. That was all there was to it.

Q. Was it a single sheet of paper?

A. Well——

Q. What I mean is——

A. Yes. It was just a lined list, and they just signed on the line that they were available.

Q. It wasn't a new application, then?

A. No. It was just a list.

Q. Have you made any further use of that list?

A. No, sir.

Q. Did anyone tell you to have these people come and sign the list, or did they just appear there and want to sign and you let them sign?

A. No. They had—Mr. Moorehead was with them and someone else.

Q. There was a Mr. Smith representing the union there.

(Testimony of Florence E. Hawkins.)

A. They more or less ushered them up to the window, and that is just the way it was handled, and then I saw that each one signed, and that's about all there was to it.

Q. Had you had any instructions from Mr. Wright about how to handle that? [30]

A. No, not that I recall. I was just told that they were coming in to sign up for work. I don't recall any specific—

Q. And you didn't hear any conversation that Mr. Wright might have had with Mr. Moorehead or Mr. Smith? A. No.

Q. Have you had any occasion to look at that—did you call it an availability list?

A. You might call it that. They signed up that they were now available for work. No, I didn't.

Q. Have you looked at it from that day to this?

A. I don't remember.

Q. At least, you didn't use it in recalling any people to work after that date? A. No.

Q. Now, after these people came in and signed this list, did Mr. Yowell or Mr. Wright tell you that they'd need some more packers or graders?

A. Yes. We needed the graders first, and—I forget—around December 10th, somewhere along in there, I think that we needed some graders.

Q. By the way, I have been assuming that it was on December the 8th, when this group of employees came up to your window and signed the list and said they were available for work. [31]

A. That sounds about the date.

(Testimony of Florence E. Hawkins.)

Q. And you also needed a couple of laborers about that time, too, didn't you? I will dig out another report for you in just a minute.

A. Well, sir, we had been hiring laborers right along.

Q. Anyway, when you needed graders, how did you obtain them?

A. Took the list and went right down the list.

Q. By the list, you mean——

A. I am speaking of my '52 seniority list.

Q. I am wondering whether you were using that list, or whether you were using this list that was used at the election.

A. As I say, not being able to compare this with the other, I can't say for sure, but I used the seniority list that was made up in '52.

Q. And I think every grader to whom you offered a position accepted immediately, is that correct?

A. Yes. [32]

* * *

Q. (By Mr. O'Brien): Miss Hawkins, I show you General Counsel's Exhibit 3, for which I thank you very kindly. I believe you typed that.

A. Yes, sir.

Mr. O'Brien: It is a tremendous job and a beautiful job, Mr. Examiner.

Q. (By Mr. O'Brien): Does that indicate the date of hire of everyone who worked during the 1952-1953 date season—I beg your pardon—1953-1954 date season?

A. I would say yes, that covers them. [35]

(Testimony of Florence E. Hawkins.)

Q. Even though they worked only one day, their name would still appear on that list?

A. I would say that everybody—that looks like a complete list.

Q. And in the first column where you say '52-'53 seniority list, date of seniority, does that indicate the original date that the individual went to work for the company?

A. It indicates what was set up on that original seniority list as their date of seniority.

Q. That is something you hope to get in Indio tonight and——

A. Would you like me to qualify that statement or explain a little further?

Q. Yes, if you would.

A. Due to the 12-week deal in the contract, perhaps they had worked for us previously, but there was a break, which meant that their seniority started as of this date.

Q. So some of these people may actually have worked many more seasons than would appear from this seniority date? A. That's correct.

Q. And some of these people here who have no seniority date may also have worked for the company in previous seasons? A. Yes.

Q. And everyone on General Counsel's Exhibit 3, filled out a new application in the spring?

A. Yes—in the fall. [36]

Q. In the fall, rather. I'm sorry.

A. Yes, sir.

Q. On page 1, toward the bottom, you will see

(Testimony of Florence E. Hawkins.)

the name of Geneva Mae Nard. A. Yes.

Q. And opposite her there are two little star marks indicating that she returned to work after the strike. Is that what it indicates?

A. I forget what month—yes.

* * *

Q. (By Mr. O'Brien): Anyway, Miss Hawkins, from other records which you submitted, I believe that the double star should appear opposite the name of Lourie Jaramillo rather than Geneva Mae Nard, and I would like to have you check that.

A. Yes, sir.

Q. Aside from that, all of your figures and list check [37] perfectly as closely as I can determine.

Then this same Exhibit, General Counsel's 3, indicates that at a somewhat later time, certain packers were recalled to work? A. Yes, sir.

Q. Will you describe first of all how the request for packers was given to you?

A. Mr. Yowell came in and told me that we were going to start the night shift, and we would need the crew to do it, and told me to call them in, so I used the original '52-'53 list and started at the top and went down.

Q. That is the original list which you will bring back tomorrow? A. Yes, sir.

Q. Thank you. Now, as you came to the first name—I think you can determine by looking at either General Counsel's Exhibit 3, or at the list that was used at the election what the first name of the packer would be that you called.

(Testimony of Florence E. Hawkins.)

A. It would be Mayme Ruby.

Q. And she indicated that she was willing to come in and work, and so "After the strike" and "January 18th," indicates that she came in to work after the strike, is that right, the date she came to work?

A. No. That indicates refusal to accept employment on the night shift. That is a refusal. [38]

Q. She said no, she couldn't come in?

A. Yes.

Q. Mayme Ruby was the first. Then Kathryn White, and you got the same answer from her?

A. Let me clarify this. Mayme Ruby is Kathryn White's mother and when I called—she lives with Kathryn—and when I called, I got Kathryn and talked to her first and asked about Mayme at the same time, so actually I never did talk personally to Mayme Ruby. Kathryn told me—they live at the same place—and she refused for her mother as well as for herself.

Q. And you had this original seniority list before you, and after you completed that call did you make a little notation on it?

A. Yes—or I didn't make it on the list, no. I copied off the names on a separate list and made the notations. I didn't copy on the original seniority list, no. I didn't make a notation.

Q. I show you General Counsel's Exhibit 2-O again; opposite the name of Mayme Ruby, you have in parentheses "Refused work," and "Kathryn White, refused work." Did you type that in?

(Testimony of Florence E. Hawkins.)

A. When this list was made up, yes.

Q. And that is what you are referring to that is the result of this telephone conversation? [39]

A. That is right.

Q. Do you happen to have the original notes of these telephone conversations?

A. I would have to check my records.

Q. But, at least, the notations that you have on General Counsel's Exhibit 2-O were taken from those original notes? A. That's right. [40]

* * *

Q. (By Mr. O'Brien): I think the exhibit will also show that you recalled, I believe, three laborers? A. Men.

Q. Men, yes. Did you have any conversation with any of the men when you called them back to work?

Mr. Babbage: Just a moment. I would like to object again. I think that the nature of the question that the exhibit shows something or other is not a proper question. It is too general. I have no way of knowing what men he is talking about, and I would object to the question on the ground that it is not clear.

Q. (By Mr. O'Brien): Suppose I call your attention to Mr. [47] Luis Luna, seniority list No. 1. Did you call him back to work after the strike?

A. Yes.

Q. Did you have any conversation with him when you called him back to work?

A. Other than I told him we would like him to come to work at such and such a time.

(Testimony of Florence E. Hawkins.)

Q. Did you have any conversation with A. Francisco Luna? A. No.

Q. Or with Luis Bautista? A. No.

Q. With regard to the graders who returned to work about December 10th, according to your chart, which is General Counsel's Exhibit 3, do you recall any conversation with LaVerda Miller?

A. No, I don't.

Q. Or Bonnie Johnson? A. No.

Q. Or Florence Schults? A. No, sir.

Q. Pearl Johnson? A. No, sir.

Q. Or Carmen Sandoval? A. No, sir.

Q. Or Nevay Carter? [48] A. No, sir.

Q. Or Mildred Moore? A. No, sir.

Q. Or Edith Wyrick? A. No, sir.

Q. Or Rosa Pizano? A. No, sir.

Q. Or Nora Edwards? A. No, sir.

Q. Or Marie Ellis? A. No, sir.

Q. You just asked them to come back to work and they came? A. Yes, sir.

Q. And with regard to graders, do you know whether any grader said no, she couldn't come back to work?

A. As near as I can see from this list, this looks like it went right down the list and evidently they all accepted. [49]

* * *

Q. (By Mr. O'Brien): Now, again I am going to direct your attention to—you can use either one of those lists that you have before you, and see if you recall any conversation with the following

(Testimony of Florence E. Hawkins.)

packers who were not recalled after the strike, immediately after the strike. [50]

Mayme Ruby. I asked you about her before.

A. And, as I say, I had no direct conversation with Mayme Ruby inasmuch as she lived with her daughter, Kathryn White, and when I called I got Kathryn direct, and, of course, since I wanted Kathryn as well as Mayme, I talked with Kathryn about it and asked her would Mrs. Ruby come in, and she refused for both of them.

Q. Did you call Anna Gagnon? A. Yes.

Q. Do you recall what she said?

A. She didn't come in. She refused the work.

Q. Lillian Fieber? A. She refused.

Q. Virginia Luna? A. She refused.

Q. Florence Flores? A. She refused.

Q. Celia Vasquez? A. She refused.

Q. Ramona Torres? A. She refused.

Q. Lupe Quijada? A. She refused.

Q. Deborah Dozier? A. She refused. [51]

Q. And Geneva Mae Nard, whom I mentioned before?

A. As I say, that needs checking, because——

Q. Now, all these people whose names I have read off to you were strikers, were they not?

A. Yes.

Q. Now, it is my same question again, whether you recall any conversation with any of the following girls when you called them:

Irene Canel. I think your records indicate that she came to work. A. She accepted.

(Testimony of Florence E. Hawkins.)

Q. These will be names of girls who accepted your invitation for night work in the spring, or in January, rather? A. Yes.

Q. Jessie DeLa Torre?

A. Yes, she accepted.

Q. Mercedes Ortiz? A. She accepted.

Q. Velia Valencia? A. She accepted.

Q. Now then, Julia Avila or Julia Luna—I assume Luna would be her married name?

A. Yes.

Q. Mary Bautista? A. She accepted. [52]

Q. Mary Durbin? A. She accepted.

Q. Angie Canel? A. She accepted.

Q. Frankie Farmer? A. She accepted.

Q. Maria Flores Reyes? A. She accepted.

Q. That is, Reyes would be her married name?

A. Yes.

Q. Jessie Sandoval? A. She accepted.

Q. Lucia Chavez? A. She accepted.

Q. Mary Mendez? A. She accepted.

Q. Lourie Jaramillo?

A. Yes, she accepted.

Q. Then coming back again, you have already told us about your conversation with Kathryn White, or did you? A. Yes.

Q. And Socorro Romero? A. She refused.

Q. Pauline Skinner?

A. She told me that she would talk with Mr. Yowell and let [53] me know later.

Q. She didn't let you know later?

A. Mr. Yowell told me she wouldn't be in.

(Testimony of Florence E. Hawkins.)

Q. Beryl Warren?

A. Same thing with Beryl. She wanted to talk with Mr. Yowell first before she gave me a definite answer.

Q. Margaret Mesa. Do you remember anything about her?

A. I don't remember. This would indicate that I didn't call her.

Q. Do you know why you didn't?

A. Probably couldn't get her. What I mean, I couldn't get her by phone, probably.

Q. But you would have——

A. I probably tried to contact her and couldn't.

Q. That is, you offered employment to people below her on the list?

A. Yes, and evidently I had no way of getting in touch with her by phone.

Q. Josephine Perez? A. She said no.

Q. Ellen Chester? A. She said no.

Q. Lucretia Dallosta? A. She said no.

Q. Manuelo Carrillo? [54]

A. She refused.

Q. Do you think you got down that far on the list? A. Yes. I got that far down.

Q. Lucy DeLa Riva?

A. No. As I say, these—Lourie Jaramillo, I believe was the last one on the list; I believe.

* * *

Q. (By Mr. O'Brien): You called Lourie Jaramillo and she was the last one you called, is that right?

(Testimony of Florence E. Hawkins.)

A. As I recall, she was the last one.

Q. Did any of these people, when you offered employment to them, ask you any questions about their seniority?

A. Well, Kathryn White asked me what her status would be, but inasmuch as I did not know, I told her I couldn't tell her a thing about it. All I was asking was would she be available and would she come in.

Q. She asked you and you said you didn't [55] know? A. That is correct.

Q. Had you had any instructions from Mr. Yowell as to what reply you should make if inquiry was made about seniority?

A. No, sir. It wasn't discussed.

Q. You didn't discuss seniority with either Mr. Yowell or Mr. Wright, then? A. No, sir.

Q. Did you have anything to do with layoffs?

A. I did not, no. Of course, it was up to me to see that my lists were up to date, and that was the basis on which they made their layoffs, but as far as the layoffs, no. That was—it was up to me to furnish lists to the packing department, and they made the layoffs. [56]

* * *

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 4 and ask you if you prepared the document? A. Yes, sir. [60]

* * *

Q. Now, I ask you again on whose instructions you prepared General Counsel's Exhibit 4.

(Testimony of Florence E. Hawkins.)

A. Mr. Wright instructed me to prepare it.

Q. Do you remember better about when it was, whether it was March 18th or later?

Trial Examiner: When she received the instructions or when she prepared the list?

Mr. O'Brien: When she prepared the instructions.

The Witness: It must have been after—a little later than the 18th of March.

Q. (By Mr. O'Brien): Do you recall whether it was before or after we had the hearing in Indio at which I presided? The date of that hearing was—in case it would help you—April the 29th.

A. It probably was before that, then. [63]

Q. You don't know?

A. I don't remember exactly, no.

Q. Now then, what were Mr. Wright's instructions to you?

A. That was to prepare a list of all those that were working as of that date.

Q. As of March 18th? A. Yes.

Q. And specifically, how did he tell you to prepare the list?

A. In the order in which—according to their seniority date.

Q. Did he tell you how to ascertain their seniority date?

A. Well, it was by my records, which—the list I had always gone by was the date that they were there plus the additions and—in that manner.

Q. I am calling your attention specifically to

(Testimony of Florence E. Hawkins.)

LaVerda Miller. What seniority do you show for her on General Counsel's Exhibit 4?

A. 12-10-53.

Q. If you will look at General Counsel's Exhibit 3, I think you will see that LaVerda Miller's seniority shows as of September 21, 1940. Am I right on that?

A. It shows on there on the 52-53 seniority list, yes, sir.

Q. As of September 21, 1940?

A. That is correct.

Q. Now, did you make that change in her seniority position on Mr. Wright's instructions? [64]

A. Yes, sir.

Q. That is what I am getting at. Just what were his instructions with regard to placing of the names on this list?

A. Well, sir, when we recalled people who came back to work after the strike, their seniority date began the day they came back to work, consequently, that made the change in LaVerda Miller's seniority date.

Q. That was Mr. Wright's instructions to you at the time you prepared this March 18th list, is that right?

A. I was told at the time—not right at the time that I called them in, but after we knew they were coming in to work—I mean when I asked what—I was told their date started from the day they came back to work, so, naturally, I had that date before

(Testimony of Florence E. Hawkins.)

I started to make this list. That had been determined when they came back to work previously.

Q. Now, you say sometime after they came back to work Mr. Wright told you what the new seniority dates would be?

A. That it would begin from the time they started back to work.

Q. Were those written instructions or oral instructions? A. Oral.

Q. Do you remember how long it was after they came back to work that Mr. Wright told you about their new seniority?

A. No, sir, I don't remember.

Q. Anyway, after you received this information from Mr. [65] Wright, did you communicate it to any employee? A. No, sir.

Q. And so far as you know, there was no change made on the posted seniority list indicating that people who returned to work after the strike were receiving new seniority?

A. I didn't make any correction on it, no, sir.

Q. I think you testified yesterday you didn't even know whether it was still up there after the strike?

A. I'm not sure whether it was or not. I haven't had it checked for awhile.

Q. Were you able to find your master seniority list that I was asking about yesterday?

A. Well, no, sir, but it was—as I say, what it consisted of was the same copy that probably the union representative has with any quits or that off

(Testimony of Florence E. Hawkins.)

of it, because I kept mine up to date and he wouldn't have had that information.

Q. After you prepared this March 18th list, what did you do with it?

A. Well, there was no occasion—the season was over, and there was no occasion to use it until the following season when we started to call back in.

Q. Do you think now that the list was prepared after practically everyone had been laid off at the end of a season?

A. I rather imagine that we had finished, or very nearly so, our operation. [66]

Q. March 18th would have been selected as a period of fairly full operation, then?

A. I would have said that on March 18th, it would probably have consisted of the nucleus that we would be using, not during the peak of the season, but possibly those that we would retain until we were ready to finish operation.

Q. Do you happen to recall approximately how many employees you had before the strike working at that time? It would be close to 300, wouldn't it?

A. I would say it should have been approximately that. I don't remember, no, but—

Q. And after the strike you never came close to that figure in that season? A. No.

Q. I think the reason was partly poor crop, loss of market, the strike, various things?

A. There were a lot of reasons, yes.

Q. Then when was the first occasion that you had to use this March 18th list?

(Testimony of Florence E. Hawkins.)

A. That would have been when I started calling back in the fall of '54.

Q. That would be August of '54?

A. Yes, sir.

Q. Did you receive specific instructions in August of 1954, as to how you were to staff the operation? [67]

A. Well, of course, as usual, we have our applications first before we do any calling in. That must be taken care of first.

Q. All right. Now, you remember the year before you sent out letters to people inviting them to apply, and the word was passed by word of mouth? You recall that? A. Yes, sir.

Q. Now, in 1954, did you send letters to people?

A. No, sir. There was no specific notification by letter.

Q. Not to anyone? A. No, sir.

Q. Did you put an ad in the paper or announce on the radio?

A. To my knowledge, there was no ad in the paper, but we had a sign up in the hallway that said that we would be taking applications September the 1st—August the 1st, I guess it was.

Q. About August?

A. No. It must have been September, September the 1st, I think that we took applications. I don't remember exactly when we started, but around that date.

Mr. O'Brien: Mark this General Counsel's Exhibit 6.

(Testimony of Florence E. Hawkins.)

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. O'Brien): I ask you to look at General Counsel's Exhibit 6 for identification.

Mr. O'Brien: Again, Mr. Examiner, I think this document [68] explains itself. It is a hiring list for the 1954-55 season.

Q. (By Mr. O'Brien): And that was also prepared by you, Miss Hawkins? A. Yes, sir.

Q. I call your attention to the third column there which indicates the starting dates in 1954 of various employees. It appears to me the first date is September 1. Is that the day when you put the first employees to work in the fall, or are there a few before that?

A. That was our official starting date for the 54-55 season.

Q. Now, before September the 1st, though, you had a number of applications on file? A. Yes.

Q. And you think now that those applications just came from people dropping in at the office and filling out applications? A. Yes, sir.

Q. When these applications were filled out, did you advise the applicants as to when they should start to work?

A. No, because, see, I don't know at the time I take an application.

Q. Now, when was the first notice that you gave

(Testimony of Florence E. Hawkins.)

to employees as to a specific time for reporting for work?

A. Well, I judge it was around the 1st of September.

Q. About the 1st of September. Was that notice given by telephone? [69]

A. When I call them in, I usually telephone, yes, sir.

Q. Did you call them in in any particular order?

A. Yes, sir.

Q. What order did you use?

A. I used this list which I had prepared on the 18th of March, 1954, and I went down it. [70]

* * *

Q. (By Mr. O'Brien): Now, this first group of names are what? [75]

A. They are packers in the order of their seniority.

Q. And the next group of names are what?

A. Are graders in the order of their seniority.

Q. The approximate break is where between the packers and the graders in the order of their seniority?

A. What designates how I know they are packers or graders, what indicates to me is their clock number. We carry a certain grouping for packers and a certain grouping for graders, and that is my indication of whether they are packers or graders.

Q. What are your numbers on packers?

A. They run from one through 200, and the

(Testimony of Florence E. Hawkins.)

graders start at 300 and go on up, so that is my indication. The clock numbers indicate to me they are packers rather than anything else. That is my way of distinguishing.

Trial Examiner: Up to 300 they are packers; over 300 they are graders?

The Witness: From 100. Then our men, of course, start from one to a hundred, then the 100 through 200 are packers—well, I should say up to 300 are packers, and then from 300 on are graders.

Q. (By Mr. O'Brien): That takes you down through Lourie Jaramillo. How did you determine the seniority of the individuals above Lourie Jaramillo?

A. Those who are on the 52-53 seniority list, on this list, that was the date used; if they hadn't been on the 52-53 [76] seniority list, it was their starting date.

Q. Then beginning down there with Alpha Gray—— A. Same thing.

Q. She is a grader?

A. Yes, sir. The grading department was set up the same way as the packers or the determining of their seniority.

Q. Now, when the seniority list—the date on the seniority list appears as December 3, 1953, Fedalino Gallardo, that indicates that she was first hired by the company during the strike?

A. That's correct.

Q. Would the same be true of the following names, that is, Elisa Gonzales? A. Yes, sir.

(Testimony of Florence E. Hawkins.)

Q. How about December the 8th, what would that indicate? A. Lillie Mae Bonham.

Q. That would be still during the strike?

A. That's right.

Q. Did you use the same principle in setting up the list of men? A. Yes, sir. [77]

* * *

Q. Anyway, you think that in the fall of 1954, you called all the people on this March 18th list by telephone? A. Yes, sir.

Q. Or, at least, you tried to reach all of them?

A. That's correct.

Q. Was that true whether or not you had an application on file from them at the time, a new application for 1954?

A. No. If I didn't have an application, I didn't call them, no, sir. [78]

Q. That is, before September the 1st, you would have to have a written application from each one of these people?

A. That's right. That they were available for work.

Q. That is the same application that you require of every employee every fall? A. That is true.

Q. You didn't call them and invite them to come in and file an application? A. No, sir.

Q. See, what I had in mind was the previous year when you sent out these letters to people.

A. I know, sir, and we didn't make any formal notification. I will say this: That usually with people who have worked for us a number of years or

(Testimony of Florence E. Hawkins.)

representative, local representative, Mrs. Bertha Adams, penciled notations which have nothing to do with the exhibit, and I think it is apparent from the testimony of the witness that there were changes made on the posted list—and also in your office copy from time to time? A. Correct.

Q. But this represents the basis of changes in seniority since November 25, 1952? A. Yes.

Q. And all subsequent changes have been alterations in this list? A. Yes, sir. [91]

* * *

Q. (By Mr. O'Brien): Miss Hawkins, did you type the list? A. Originally, yes, sir.

Q. Was the information thereon contained true at the time you typed it?

A. To the best of my knowledge.

Q. Was it based upon company records which you consulted? A. Yes, sir. [92]

* * *

Cross-Examination

By Mr. Babbage:

Q. Is it true, Miss Hawkins, that all of the people on that list were either contacted or an effort was made to contact them for employment with the exception of the one person who was not hired that season, Elisa Gonzales, prior to the beginning of the season in 1954, that is, prior to September 1, 1954? A. Yes, sir. [95]

* * *

JOHN JANOSCO

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Brien:

* * *

Q. By whom are you employed?

A. United Packinghouse Workers of America.

Q. And that is affiliated with the American Federation of Labor and Congress of Industrial Organizations?

A. That's correct.

Q. What is your official title?

A. I am field representative.

Q. Is Indio part of your territory?

A. Yes, it is.

Q. When did you first meet Mr. Babbage?

A. I first met Mr. Babbage I believe at the hearing we had on the challenged ballots in Indio on this case.

Q. Was that also your first meeting with Mr. Wright?

A. It was my first meeting with Mr. Wright, that is correct. [96]

Q. After the United Packinghouse Workers was certified by Mr. Yager as acting Regional Director, did you attempt to communicate with the California Date Growers Association?

A. I did.

Q. Was that by letter?

A. By letter.

Mr. O'Brien: Mark this as General Counsel's Exhibit 8.

(Testimony of John Janosco.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 8 for identification. I ask you to look at General Counsel's Exhibit 8 for identification, the yellow carbon. Is that the original copy of the letter that you sent to the Date Growers Association? A. It is.

Q. Did you receive any reply to that communication? A. No, I did not. [97]

* * *

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 8

October 22, 1954.

California Date Growers Association,
Corner Highway 99 and King Streets,
Indio, California.

Gentlemen:

Under date of October 21, 1954, Mr. George A. Yager, Acting Regional Director for the Twenty-first Region of the National Labor Relations Board, certified the United Packinghouse Workers of America, Local #78, CIO.

(Testimony of John Janosco.)

The Certification provides that our Union is the exclusive representative of all the Employees in the Unit as set out in the consent election agreement. Therefore, we request that a meeting be set for November 8, 1954 at 10:00 a.m. in your office in Indio for the purpose of discussing rates of pay, hours of work, seniority, vacations, and other conditions of employment. We are prepared to discuss same with the view in mind of reaching a signed agreement.

I trust we can reach an understanding that will provide stable employer-employee relationship. An immediate answer to this communication at your earliest convenience will be appreciated.

Yours truly,

JOHN JANOSCO,

Field Representative, United
Packinghouse Workers of
America, CIO.

JJ:l

cc: H. Hinejosa

Special Delivery Receipt Requested

Admitted in evidence January 10, 1956.

Trial Examiner: I believe it is your position that the union was not properly certified, therefore, you had no duty to bargain following that certifica-

(Testimony of John Janosco.)

tion, and, in fact, did not bargain. Is that your position?

Mr. Babbage: That is right, sir. [98]

* * *

FLORENCE E. HAWKINS

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

* * *

By Mr. O'Brien:

Q. I show you General Counsel's Exhibit 16 for identification. Did you prepare that list?

A. Yes, sir.

Q. Does it contain the names of all persons hired for the 1954-55 season, whose names did not appear on the March 18th, 1954 list?

A. I would say that it did, yes, sir.

Q. So General Counsel's Exhibit 16 and the March 18th, 1954, list together would show all the names which show on the large hiring chart for 1954-55?

A. I believe that's correct. [110A]

* * *

Q. And it is your testimony that all of these people filed new applications in the fall of 1954?

A. Yes, sir.

Q. That is, all the people whose names appear on General Counsel's Exhibit 16?

A. Yes.

(Testimony of Florence E. Hawkins.)

* * *

Q. (By Mr. O'Brien): Now, in General Counsel's Exhibit 17 entitled "List of 1954-55 Applicants not Hired," did you prepare that list?

A. Yes, sir.

Q. To the best of your knowledge, does it contain the names of all the persons who filed written applications for work in the fall of 1954, who were not hired? A. I believe it did.

Q. If someone just came in and inquired about work but did not file a written application, her name would not appear on that?

A. They are not taken into consideration, no. [112]

* * *

Mr. O'Brien: The problem in this case is to ascertain the limits of that group. It has been made very easy for us here by the respondent itself. The respondent, when it signed this consent election agreement, said in effect, "The people who have a reasonable expectancy of future employment are as follows."

If these people had not had a reasonable expectancy of future employment, they should not have been permitted to vote. They are and they were the company's employees. They included all persons on Miss Hawkins' revised seniority list. They included all persons hired during the strike, and that is all they included. That group remained constant.

On that group, as will appear from the Regional

Director's report, appear the names of certain men on the seniority list who were specifically replaced. As to those men who were specifically replaced, specifically disenfranchised, the company owed no further obligation to them.

Trial Examiner: What list is that, Mr. O'Brien? Will you refer to the transcript and be specific by exhibit number?

Mr. O'Brien: I am referring specifically to General [140] Counsel's Exhibit 2-O, the seniority list of the 1953-54 season. Under "Men" you will note that Albert Esquer—

Trial Examiner: Now, just a moment. What page of 2-O is that?

Mr. O'Brien: It is the final page the way the original is assembled.

Trial Examiner: Yes, sir.

Mr. O'Brien: Albert Esquer was replaced by Albert Porter on December 2, 1953. That was one job, Albert Esquer's job. He was replaced by Mr. Porter.

Trial Examiner: I follow that, and I also see that there are other similar notations on that page.

Mr. O'Brien: Seven similar replacements. Now, seven replacements is all there were, there were no others.

Trial Examiner: That is all this exhibit shows, at any rate, is that correct?

Mr. O'Brien: At that particular point. If there had been any other employees on the 1952-53 seniority list who had been replaced, it was the obligation of the respondent to call it to the attention of the

Regional Director or his agent prior to the election or at the election. It did not do so.

Trial Examiner: What is your response to that, Mr. Babbage.

Mr. Babbage: Well, I don't know that we claimed that anyone else was replaced.

Trial Examiner: Well, if you don't, why, that takes care [141] of the replacements then, in that case, doesn't it?

Mr. Babbage: That's right. [142]

* * *

FLORENCE E. HAWKINS

witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. O'Brien:

Q. Miss Hawkins, we may have been over this before, but does General Counsel's Exhibit 2-O represent all the employees who had acquired seniority by December the 8th of 1953—I mean December the 1st of 1953, the day the strike started?

A. May I make my answer this way? It appears to be a list of the employees covered by the 52-53 seniority list and seems to have notations of those who were not even in the 52-53 season. Whether or not it is a complete list of those with seniority as of 12-8, without checking the employees working in 52-53 who had put in 12 weeks, that I cannot say.

(Testimony of Florence E. Hawkins.)

Mr. Babbage: Well, we can stipulate that it is the seniority list.

Mr. O'Brien: But I want to establish that it is the seniority list as of December 1, 1953.

Mr. Babbage: Yes, we can so stipulate.

The Witness: It appears to be.

Q. (By Mr. O'Brien): Now, in addition to the employees named on that seniority list, there were other employees without seniority before the strike started? [157] A. Yes.

Q. And some of the employees——

Trial Examiner: I take it that means newly hired employees during that season?

The Witness: That is correct.

Q. (By Mr. O'Brien): And some employees without seniority went on strike?

A. Yes, sir.

Mr. O'Brien: Now, with those we are not concerned, I want to make that very plain. [158]

* * *

Mr. O'Brien: I shall now read off the names of graders whose names appear on General Counsel's 2-O who were returned to work on December 10th. I shall ask the witness whether or not each one, after I finish, went on strike.

LaVerde Miller; Bonnie Johnson; Florence Schults; Pearl Johnson; Carmen Sandoval; Nevay Carter; Mildred Moore; Edith Wyrick; Rosa Pizano; Nora Edwards; Marie Ellis.

Trial Examiner: The question for the witness is:

(Testimony of Florence E. Hawkins.)

Did all those named persons go on strike, if you know?

The Witness: And I would like to make a statement in connection with my answer. All my testimony up to the present time has been in regard to facts and exhibits that I prepared on facts and records that I tried as close as possible to keep accurate. There is absolutely nothing in my records where I could honestly say these people went out on strike or left for any other reason. I cannot honestly say that. [159]

Q. (By Mr. O'Brien): Can you honestly say that they did not work during the week of December 1st to December the 8th, 1953?

A. I can say that they came in on December the 1st and went out at 10:00 o'clock and did not return.

Q. Then that would be true of the remainder of these names which I am going to ask, these individuals came in at 10:00 o'clock on December 1st and walked out and did not report again until December the 8th or 9th, is that right?

A. December the 10th.

Trial Examiner: The question is: Has he correctly stated the facts?

The Witness: They came in on the morning of the 1st, walked out at rest period, at 10:00 o'clock and did not return to work until December the 10th.

Q. (By Mr. O'Brien): And you were saying you don't know whether they were strikers or whether they just decided to be sick?

(Testimony of Florence E. Hawkins.)

A. That's correct. [160]

* * *

Mr. Babbage: May I ask that the list from which the witness is testifying be identified as exhibits for the purpose of the record?

Mr. O'Brien: They are my own notes here, and I'd be very happy to have copies made of these for everyone, since she is using them to——

Mr. Babbage: Do you have any objection to identifying them as an exhibit for identification?

Mr. O'Brien: Not at all. I would be very happy to.

Mr. Babbage: Whether or not they can be introduced is another question, but at least we will have them for identification.

Mr. O'Brien: At least you will know what you are talking about.

Mark these as General Counsel's Exhibit 18-A through 18-I. [161]

* * *

Mr. O'Brien: General Counsel's Exhibit No. 18-A is my note sheet entitled "Graders Returned December 10th, 1953, after Strike."

General Counsel's Exhibit B is a note sheet entitled "Graders Returned in Fall of 1954 without Seniority."

Q. (By Mr. O'Brien): Now, my question with regard to General Counsel's 18-B is the same as with regard to 18-A: Did each one of those individuals leave on September the 1st and return on September the 10th?

(Testimony of Florence E. Hawkins.)

A. December 1st and December 10th.

Q. December 1st and December 10th?

A. That's correct—no, not these. They didn't return until the following fall.

Q. They didn't return to work, but these would be among the group that signed that availability slip?

A. Well, they probably did, yes, sir.

Q. At least, they did not work during the 1954 season, the 1954 spring season, none of them did?

A. No, sir.

Q. These names are Iona Hollenbeck, Grace Martin, Mary Velasquez, Jane Harlan, Helen Misenheimer, Mary Ellen Glass, Grace Young, Iva Webster, Constance Moore Wilson, Grace Toby, Renvy Roman and Mable Puckett. [162]

A. Yes.

* * *

Q. (By Mr. O'Brien): Miss Hawkins, were they returned as new employees? A. Yes, sir.

* * *

Q. (By Mr. O'Brien): Are these individuals who ceased work on December the 1st and did not work any more during the 1953-54 season?

A. Yes, sir. [164]

* * *

Q. (By Mr. O'Brien): I ask you to look at General Counsel's Exhibit 1-C—

Mr. Babbage: What is it?

Mr. O'Brien: The caption I have on that is "Graders Not Returned."

(Testimony of Florence E. Hawkins.)

Q. (By Mr. O'Brien): Miss Hawkins, did you check the figures in my first and second columns against any exhibits? A. No, sir.

Q. But you did check the names that I listed?

A. Yes, sir.

Q. And what check did you make of those names?

A. They were not hired during the 54-55 season. [166]

* * *

Mr. Babbage: That is a copy of Exhibit 18-C for identification.

Trial Examiner: For identification only.

Mr. Babbage: For identification.

Trial Examiner: All right. Thank you. [167]

Mr. O'Brien: The first column indicates the seniority date taken from the 1953-54 hiring list. The second column indicates the seniority number taken from the seniority list which was used in the election. The third column is a list of names, the name of the individual appearing on the 1953-54 hiring list, appearing on General Counsel's Exhibit 2-O which is the seniority list used at the election, not appearing on the March 18th list, not appearing on the list of employees hired in 1954-55.

Q. (By Mr. O'Brien): Can you tell us, Miss Hawkins, why their names did not appear on the March 18th list? A. Yes, sir.

Q. What was the reason?

A. In the case of Antonio Delgado, she was given a referral card to take the——

(Testimony of Florence E. Hawkins.)

Q. I am talking about the March 18th list, General Counsel's Exhibit No. 4 was the one I referred to.

A. And why they did not appear on that list?

Q. Yes, why they did not appear on that list.

A. They did not work after December 1st.

Q. That is, no one who did not work after December 1st, 1953, got her name on the March 18th, 1954, list, is that right?

A. That's correct.

Mr. O'Brien: And, of course, it is the contention of the General Counsel that these individuals named in General [168] Counsel's Exhibit 18-C were employees whose names should have been included on the March 18th list.

Trial Examiner: When you say "these persons," you are referring to the persons appearing——

Mr. O'Brien: On General Counsel's Exhibit 18-C for identification.

General Counsel's Exhibit 18-D is my work sheet entitled "Packers Returned January 18, 1954." The first column indicates the seniority date from the 1953-54 hiring list. The second column is a list of names. The third column is the employees' seniority number on General Counsel's Exhibit 2-O, and the fourth column is the employees' number on General Counsel's Exhibit No. 4. In the broad section there is a notation—a few dates indicating the dates on which these individuals were hired in the fall of 1954. That comes from the 1954 hiring list.

These packers returned on January 18th, 1954,

(Testimony of Florence E. Hawkins.)

are, of course, in the same position as the graders returned on December 10th, 1953.

General Counsel's Exhibit 18-E for identification is entitled "Packers Returned in Fall of 1954 without Seniority."

The first column shows the date of their employment as shown by the hiring list of 1953-54. The second column is their seniority number as shown in General Counsel's Exhibit 2-O. The third column is the name. The fourth column is the [169] date on which they returned to work in the fall of 1954.

Q. (By Mr. O'Brien): Miss Hawkins, with regard to General Counsel's Exhibit 18-E, can you tell us why these names are not included on General Counsel's Exhibit 4?

A. They did not work, either.

Q. After the 1st of December, 1953?

Trial Examiner: I suppose you want the record to carry the witness' testimony. You made a statement, but I didn't hear the witness' answer.

The Witness: No, sir.

Q. (By Mr. O'Brien): They did not work after December the 1st, 1953, is that right?

A. That's right. [170]

* * *

Q. (By Mr. O'Brien): Miss Hawkins, with regard to all of these summaries, General Counsel's Exhibits 18-A through 18-I, did all of those employees cease work on December the 1st, 1953?

Trial Examiner: You understand, Miss Haw-

(Testimony of Florence E. Hawkins.)

kins, when he says "cease work," that implies that they were working up to that time?

Mr. O'Brien: Yes.

The Witness: Well, sir, I would have to check the '53-'54 hiring list before I can answer definitely because some of these names—I don't recall that they were hired in the '53-'54 season.

Q. (By Mr. O'Brien): On Duane Ellis, [171] '53-'54——

A. He did not work in the '53-'54 season.

Q. You notice here that it indicates his date of employment as October the 8th, 1953. I think that "Working elsewhere this season" applies to Mr. Robert——

A. I guess he did work in '53.

Q. I attempted to make that check.

A. I can't remember, and, as I say, it seems some of those—I doubted whether they were in. After all, it is quite awhile for me to remember definitely whether that certain employee was in, but if you have checked him with my hiring list, and you are sure that it shows a hiring date, then I can say that they did not work after December 1st.

Mr. Babbage: I move that answer be stricken on the ground that it is not the witness'——

Trial Examiner: Well, it is based on an assumption of the General Counsel's compilations, so unless the respondent wishes to accept that as accurate, why, I don't think the answer has any particular meaning, Mr. O'Brien. I presume that you have a record in here that shows as to each of these names

(Testimony of Florence E. Hawkins.)

whether or not that particular person was at work as of December 1st. Do you?

Mr. O'Brien: When you look at the 1953-54 hiring record, which is General Counsel's Exhibit 3, the third column indicates a date on which the individual started to work.

Miss Hawkins, is that true? [172]

The Witness: That particular year?

Mr. O'Brien: That particular year, yes.

The Witness: Yes, sir.

Q. (By Mr. O'Brien): And if the individual quit for any reason before the strike, there would be a notation in the following column "Quits Before Strike," is that right? A. That's right.

Q. So if the individual's name appears in the first column, and there is no notation under the item "Quits Before Strike," it indicates that the individual was working on the day the strike started?

A. That should be correct.

Q. With regard to General Counsel's Exhibit 18-F for identification——

Mr. Babbage: If the Examiner please, this copy is as close as we can make it a true copy. We had to make it by hand.

Trial Examiner: All right. Thank you.

Mr. O'Brien: Again the first column indicates the seniority from the seniority list in the '53-'54 hiring record. The second column indicates the seniority number from General Counsel's Exhibit 2-O, and the third column is the name. In the final column headed "Application," the date 9-7, indicates

(Testimony of Florence E. Hawkins.)

that Miss Hawkins has a record of an application which is in General Counsel's—off the record.

(Discussion off the record.) [173]

Trial Examiner: On the record.

Mr. O'Brien: General Counsel's Exhibit 17, indicates that Mayme Ruby, for instance, filed an application on September the 7th. Where the word "No" appears under the word "Application," I found no record of an application in General Counsel's Exhibit 17.

General Counsel's Exhibit 18-G for identification entitled, "Men Returned January 18, 1954," the first column shows the seniority date; the second column the seniority number from General Counsel's Exhibit 2-O; the third column shows the number on the March 18th, 1954, list, their position on that list.

General Counsel's Exhibit 18-H entitled, "Men Returned in Fall of 1954 without Seniority," the first column indicates the seniority date, the second column indicates the seniority number from General Counsel's Exhibit 2-O, the third column is the name, and the fourth column is the date on which they were returned to employment in the fall of 1954.

As General Counsel's Exhibit 18-I entitled, "Men not Recalled," the first column indicates the seniority date; the second column the seniority number; the third, the name; and the final column shows that apparently none of those individuals filed written applications as evidenced by General Counsel's Exhibit 17.

(Testimony of Florence E. Hawkins.)

I offer General Counsel's Exhibits 18-A through 18-I as a [174] summary of the facts shown by the documents received in evidence which I have indicated and is nearly as complete a list as I can compile of individuals who suffered some degree of discrimination in employment by virtue of the fact that the employer abandoned its 1952-53 seniority policy in favor of a policy based on its March 18th, 1953, list. [175]

* * *

Trial Examiner: Do you want to state a position on whether or not I should receive these summaries or not?

Mr. Babbage: Well, my position on the motion to dismiss is that I object to the introduction of the evidence.

Trial Examiner: I understand.

Mr. Babbage: A running objection.

Trial Examiner: I think we understand that you have a continuing objection to anything that Mr. O'Brien brings in because of his statement that he had rested. Further than that, though, do you have any special objection to receipt of these summaries?

Mr. Babbage: No, I haven't.

Mr. O'Brien: They are not evidence. I wouldn't—

Trial Examiner: They are not evidence except to the extent that the witness has testified to them.

Mr. O'Brien: That is right, but I do hope that they will be helpful. I put a lot of time in on them.

Trial Examiner: Well, as an index to the ex-

(Testimony of Florence E. Hawkins.)

hibits stating the General Counsel's position, I should like to have them and I will receive them in evidence. [177]

* * *

Q. (By Mr. O'Brien): If you will look at your 1954-55 hiring list, you will notice it shows layoffs, temporary lay offs. When was the first temporary lay off on that list? I think it was December, wasn't it, just before Christmas?

A. Well, that was the Christmas lay off, but I believe you will find there was a layoff previous to that one.

Q. I don't mean individuals. I mean group lay offs.

A. I believe our night shift was cut off sooner than that.

Q. Anyway, the persons selected for that group layoff were selected how, if you know?

A. I do not know, because it was handled—the Christmas lay off from 12-22, to 1-3, was the plant closed down for the holidays. When you refer to the night lay off, that was the night deal that was discontinued. Other temporary lay offs that might be listed on here, I don't know how they did that. That was done in the packing department.

Trial Examiner: What is this, the 1954 season that you are talking about?

The Witness: '54-'55. [178]

Q. (By Mr. O'Brien): Do your records indicate that in the case of these lay offs, the people on the March 18th list were the last ones laid off?

(Testimony of Florence E. Hawkins.)

A. I will say that as far as the permanent lay off, it would show that, yes, sir. [179]

* * *

JAMES F. WRIGHT

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Babbage:

Q. Mr. Wright, what is your position?

A. I am general manager of the California Date Growers Association.

Q. And how long have you been so employed?

A. Approximately five years.

* * *

Q. (By Mr. Babbage): Now, at the time that you were first employed as general manager of the California Date Growers Association, was there a union representing the employees?

A. No, there wasn't.

Q. Could you give us the time and the circumstances with respect to when a union first represented the employees of this Association?

A. There was some contact with the union during the month of November, in 1951, and some meetings were held with union representatives and members of the National Labor Relations Board in Los Angeles, and a consent election was agreed [190]

(Testimony of James F. Wright.)

upon and signed and an election was held on, I believe, the 17th of December, 1951.

Mr. O'Brien: Mr. Babbage, I have the file on Case No. 21-RC-2274 to which Mr. Wright is referring there. If there are any significant dates you want in, why, I'd be glad to supply them.

Mr. Babbage: Fine. Actually my purpose is to merely give the Examiner a general picture of the situation and I don't know that the dates are pertinent at this particular phase of the examination.

Mr. O'Brien: I just want you to know that it is available here.

Mr. Babbage: I appreciate having it available.

Q. (By Mr. Babbage): Do you recall what the vote was in the original consent election in this matter?

Mr. O'Brien: That is a matter of official record which I have right here. The tally of ballots issued December 17, 1951, in 21-RC-2274 shows:

Approximate number of eligible voters: 320.

Void ballots: 3.

Votes cast for United Fresh Fruit and Vegetable Workers, LIU 78, CIO: 158.

Votes cast against participating labor organization: 127.

Valid votes counted: 285.

Challenged ballots: 2. [191]

Valid votes counted plus challenged ballots: 287.

A majority of the valid votes has been cast for United Fresh Fruit and Vegetable Workers, LIU 78, CIO.

(Testimony of James F. Wright.)

Paul J. Driscoll signed for the Regional Director; Bertha Adams signed for United Fresh Fruit and Vegetable Workers LIU 78, and Helen Kriessel signed for the California Date Growers Association.

The Witness: I recall that as right. As I recall, if five per cent of the people, approximately, had voted different, it would have been a tie or one way or the other, I don't remember.

Q. (By Mr. Babbage): After this election, did you enter into negotiation with the union for the purpose of agreeing on a contract?

A. Yes, we did, and started negotiations right after the first of the year in '52.

Q. And did you enter into a contract with the United Fresh Fruit and Vegetable Workers as the exclusive agent of your employees?

A. Yes, we did.

Q. Do you remember the approximate period during which that contract was in effect, in other words, do you remember when it became effective?

Mr. O'Brien: I think that is set forth in the complaint and admitted in the answer. [192]

The Witness: As I recall, the contract was entered into in October of '52, and it had covered from August of '52 until July 1st of 1953.

Q. (By Mr. Babbage): Now, did you enter into negotiations with the United Fresh Fruit and Vegetable Workers toward the end of that contract period, let us say, during the summer of 1953, for the purpose of negotiating a new contract?

A. As I recall, our negotiations started a month

(Testimony of James F. Wright.)

prior to the expiration of the contract, so that would be in June of '53. [193]

* * *

Q. Now, on or about the 1st of December, 1953, a number of the employees left your plant, is that right? A. That's correct.

Q. Now, during that period were you in operation in the plant?

A. Yes. We continued operation December 1st, the balance of that week, and to the next week, until we were advised by telegram from the union that the employees were returning to work.

Q. Now, during the period that you were in operation, did you have any conversations with the employees either directly or through representatives with respect to the status of the employees who remained and the status of employees who were employed and the status of employees who would come back to work?

A. Yes. I was in, you might say, constant touch with the employees during this period. In fact, I used to pick them up—quite a few of them up and escort them into work every morning, and was in contact not only with the employees who remained during the strike and those who were hired during the strike, and also the ones that returned to work during the strike.

Q. What was your position with respect to the status of these various classes of employees that I have mentioned, that is, those who remained work-

(Testimony of James F. Wright.)

ing during the strike, those who returned to work during the strike, and those who were employed during the strike as new employees for work that you had to have [194] done?

* * *

Q. (By Mr. Babbage): What did you do with respect to the employees that I have described here?

A. Well, as would be natural under a trying situation, the employees would be concerned with their job security, and I assured them at the time that those who had remained through the strike, the replacements and the people who returned, that they would be—had become and would be treated as the nucleus of our work force; that we didn't know how long the strike would go on; that we intended to continue to operate the plant and receive and grade and pack and ship our dates, and that these people we felt were a necessary part of our business; and that I gave them the assurance that they would be maintained if and when the strike was terminated.

Q. Did any employee or group of employees ask you what your position was before they would come to work for you during this time, during the strike period? [195]

Trial Examiner: You are referring to the group that remained at work now?

Mr. Babbage: I am referring to new employees that came in during the strike.

The Witness: Myself personally, I may have

(Testimony of James F. Wright.)

had some direct contact with them at the time of coming in—I do not recall right now—but this policy of assuring the people security was known by the other supervisory people in the plant who were more closely in contact with the hiring of people during the strike, namely, Mr. Yowell, the plant manager, who had a great deal to do with the—a great deal of contact with the people when hired, but after they were hired is when I had my contact with them. [196]

* * *

Cross-Examination

By Mr. O'Brien:

Q. Did you talk to any of the strikers who returned to work after December the 10th about their status?

A. Are you referring to the January 18th—

Q. Well, there were some returned on December the 10th. The packers returned on December 10th, and the men—— [198]

A. The graders.

Q. Rather, the graders returned on December the 10th—the graders went back first, then the packers, and the men returned on January 18th.

A. That is right.

Q. Did you have any conversation with any of them about this policy that you just described to Mr. Babbage?

A. With the people that came back December 10th, I talked to those people, some of those people, in case I had some occasion to during the day. With regard to this policy that I spoke of with Mr. Bab-

(Testimony of James F. Wright.)

bage, I didn't. I was out of Indio during January to a convention back east, and I wasn't there when the people returned on January 18th.

Q. Was your new policy placed in writing in any way?

A. Not in any writing other than the preparation of the list.

Q. That is this March 18th list which Florence prepared sometime after the close of the season? Is that the only writing?

A. I don't remember the exact date that the March—that has a March 18th date on it. When that list was prepared, I'm not sure.

Q. What I am asking about is whether there was any written notice to the employees that those who worked during the strike would receive deferred treatment in the future?

A. There was no written notice of the policy that I [199] described. The supervisory personnel in the plant were all advised and aware of it.

Q. By the supervisory personnel, you mean Mr. Yowell?

A. Well, Mr. Yowell, Mr. Cawthon, Faye Gillespie, Effie Gray, Henry Villa, Mr. Buzard. They are supervisory personnel through the plant.

Q. Did you tell Miss Hawkins about the policy?

A. She was advised of it. When and by whom I'm not sure, but she would have—she was advised of the policy, and if I may refer to some records here, I think I can tell you. Chances are, if she hadn't known earlier, she would have known some-

(Testimony of James F. Wright.)

time in February, '54. I'm not sure when she was advised.

Q. Do you know how long the seniority list remained posted in the plant?

A. Truthfully, I don't know.

Q. You don't know whether it was still up after the strike or not?

A. I would be guessing if I knew—if I said I knew I would be guessing, is what I mean. I do recall that some of the notices were taken off the union bulletin board by the employees during the strike. Whether the seniority list was taken off then, I don't know.

Q. Anyway, you know that somewhere along the line it has disappeared, and it wasn't removed at your instructions? A. No. [200]

Q. And since that seniority list, have you ever posted any seniority or priority list which would indicate to the employees how they stood in job opportunities?

A. They were advised, Mr. O'Brien, but I don't think that a list was posted.

Q. That is, you don't think there was ever any written memorandum evidencing this policy which you described to give preference to people who worked during the strike?

A. I don't think so.

Q. Are you pretty sure that you did not tell any of the returned strikers that they had lost seniority by reason of the fact that some people had continued to work during the strike and they had not?

(Testimony of James F. Wright.)

A. I didn't personally. One of the problems after a strike when you have people come back, you have the problem of trying to rebuild a co-ordination between some people who are out and some people that were in, and it isn't too good business policy to agitate that situation at the time they return. You are interested in business continuing.

Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and wanted personal assurance that they would be taken care of after the strike, you gave it to them?

A. That's right.

Q. And that is about all it amounted to? [201]

A. Well, you say that is about all. It was a pretty important thing for the people——

Q. It is very important to a girl who had no seniority and was working during the strike and wondered what would happen to her job when seniority employees offered to come back. I understand that. But I want to know whether your publication of your determination to protect these people went any farther than individual assurances.

A. I believe, Mr. O'Brien, that I talked—well, I know that during the strike I would talk to the working force that was there every day, and this was one of the primary things these people were concerned about, so I am sure they were advised of it in meetings of all the people who were at the plant. As I recall, I met—I had met with the graders and the people in that area of the plant in one

(Testimony of James F. Wright.)

meeting, and met with the packers and the people in the pitting department in that area of the plant at another meeting, but that was a daily occasion during the strike.

Q. That was to encourage them to get out production, let them know you were with them, is that it?

A. Well, it covered a lot of things.

Trial Examiner: Mr. Wright, do you have any distinct recollection whether, during any of these meetings that you had with the employees during the strike, whether you specifically mentioned the matter of their security to them? [202] Do you have a recollection of it?

The Witness: Yes, I do.

Q. (By Mr. O'Brien): I call your attention to Page 68 of the transcript of the Indio hearing, which is General Counsel's Exhibit 2-KK. These are questions by Mr. Janosco:

"Isn't it true that when they applied for jobs they were advised that their seniority would begin as of that date?"

And your answer was, "I don't know."

Do you recall that testimony now, Mr. Wright?

A. Yes.

Q. Then further on Mr. Janosco asks:

"Isn't it true that they were starting as new employees with a 15 cent an hour cut in wages?"

And your answer was, "They were hired back. There was no question raised, to the best of my knowledge, which said they were new employees or

(Testimony of James F. Wright.)

that they were not. They were told there was a job and they were asked to come back to work. The same thing is true in the grading department, when some nine or ten girls were hired back into the jobs that were available."

And further on Page 69: "In other words, the workers were not advised that they were losing seniority or they were not taking a cut in wages?"

"A. No. Actually, with regard to the seniority, to the best of my knowledge, they were not advised.

"Q. Starting as new employees and losing their seniority, [203] also?

"A. As far as I know, they were not advised of that, and I gave no instructions to that effect."

Is that still true now?

A. Yes. I think that was what I testified to here.

Q. Yes. I was reading your testimony.

A. I mean I testified to that a little earlier, too. [204]

* * *

Trial Examiner: As I understood his testimony, he said that these people who worked on the night shift, when that night shift was discontinued yet people on the day shift continued to work, that those on the night shift would then know that something had happened to their standing on the priority or seniority list. That is the way I understood his testimony. [206]

The Witness: That is the way I meant it.

Q. (By Mr. O'Brien): That wouldn't neces-

(Testimony of James F. Wright.)

sarily be so, would it, because they were hired specifically for a night job, the night job is over, they wouldn't know that there had been any real change there in the seniority policies?

A. Well, in the past, Mr. O'Brien, if a person had worked nights and the night shift was not called for any more, and laid off, those people who had worked nights, if they were higher in seniority than those in the day shift, they would have come back to work on the day shift and people further down on the seniority list would have been laid off.

Q. Oh, I see. If you had been applying your seniority policy when these girls were laid off on the night shift, they would have been able to bump the people that were hired during the strike, and people who worked during the strike without seniority, is that right?

A. If there hadn't been any strike, and we had had the night shift, and those people had worked on nights and with higher seniority, they would have bumped people on the day shift, that's right.

Q. Was that an old policy of the company before you had a union?

A. I think the testimony in here states that that policy had been in existence. [207]

* * *

Q. That reminds me of something else. You were testifying about a priority list, and Mr. Janosco examined it, and you examined it, and you studied there for a long time, and then nothing happened.

(Testimony of James F. Wright.)

I am asking you now whether, on the priority list that you had, were the names from that carried over into the first seniority list which we have in evidence here, do you remember?

A. You are referring to a priority list prior to——

Q. The priority list you testified about in Indio, the seniority list.

A. I feel very sure, Mr. O'Brien, that they by and large did. There was a great deal of problem in establishing a seniority list, there was a lot of work that Florence and her people went through in obtaining it, and we got one list, and then there were—that was turned down, and we got—we then sat down with Mr. Moorhead and agreed upon a way to draw up the list, and that was brought to the union meeting, and that was turned down, and it derived back to the original list, so I think by and large that would be most likely true. [210]

Q. So that the company's own priority list formed the basis for the seniority list which found its way into the contract with all these hassles and refinements?

A. Well, with some exception, Mr. O'Brien, in that the contract specified twelve weeks employment, and it might have had some effect upon the previous priority list.

Q. And your priority list was used to recall employees from one year to the next?

A. That is right.

* * *

(Testimony of James F. Wright.)

Trial Examiner: On these persons that you hired during the strike, did you have any personal interviews with any of them that you recall?

The Witness: Personal interview before hiring?

Trial Examiner: Yes. Yourself.

The Witness: No, I didn't.

Trial Examiner: Had you issued any instructions as to what [211] was to be said to them with reference to security?

The Witness: No.

Trial Examiner: Well, the question is: Do you recall?

The Witness: No, I don't recall. All I recall on this instance, Mr. Examiner, is the daily meeting of personal contact in the plant.

* * *

Redirect Examination

* * *

By Mr. Babbage:

Q. Mr. Wright, there is one point that I would like to clarify with a few questions, and that is with respect to the employees who were not working at the conclusion of the strike; as those employees were recalled for work as work became available, what policy did you follow and in what order did you call those employees in? [215]

A. At the conclusion of the strike we put into effect the policy, and have followed it since, that in calling back to work additional people other than those employed as of December 8th, we followed the

(Testimony of James F. Wright.)

1952-53 seniority list, I think as evidenced in the first ten people called back in grading on December 10th, 1953, and the method we followed in January of 1953, in calling the people for the night shift, we started with the 52-53 seniority list and went down that list to call in the people who were not working. Again in September of 1954, after we had hired the people who are on the March 18th list, the additional people that were called in, we again went down the 1952-1953 seniority list as the method of calling them in.

Q. So that within the group of all of those people who were recalled for employment after the strike, you followed that seniority without any deviation?

A. Without any deviation, that is right. [216]

* * *

Q. (By Mr. Babbage): Mr. Wright, I would like to direct your attention to Exhibit 2 of the General Counsel and to Subsection YY, the supplemental report on challenges of the Regional Director, dated the 5th day of October, 1954. I would also like to direct your attention to General Counsel's Exhibits 18-E and 18-F.

Now, by referring to those three exhibits, Mr. Wright, will you tell me which of the twelve employees, if any, whose names are set forth in Exhibit 2-YY of the General Counsel, ever applied for work at the California Date Growers Association after they refused employment in January, 1954?

(Testimony of James F. Wright.)

A. If it is all right with Mr. O'Brien, may I put in an additional few check marks on here?

Kathryn White did——

Mr. O'Brien: Does that indicate she was employed?

The Witness: This date, I think she testified, was the hiring date, the date she went to work.

Q. (By Mr. Babbage): You better state the date. [231]

A. 2nd of September. Soccoro Romero on the 25th of October. In both cases, this was 1954. Pauline Skinner, September 2nd, 1954. Beryl Warren, September 2nd, 1954. Ellen Chester, September 2nd, 1954. Lucretia Dallosta on September 16th, 1954. Manuella Carrillo on September 17, 1954. There is a slight difference in spelling between the two, but I assume it is the same person.

Q. Is that all? A. Yes.

Q. Now, the other employees, Lillian Fieber, Florence Flores, Anna Gagnon, Lupe Quijadas and Mayme Ruby did not work for the company again, is that right?

A. That's correct. You are referring to this——

Q. Yes. Which of these five employees which I have just named, if any, applied for work in the 1954-55 season?

A. Well, Exhibit 18-F indicates that Mayme Ruby did, and that Lupe Quijadas did. It indicates that Anna Gagnon did not apply, Lillian Fieber did not apply, and Florence Flores did not apply.

(Testimony of James F. Wright.)

Q. In other words, there were three of those employees, then, that never applied for work again?

A. Yes. [232]

* * *

Mr. Babbage: We are not in a position to say that there was or was not any impropriety in those proceedings from the Regional Director's standpoint, and by making that statement, I don't mean to infer that there was or that there wasn't.

However, our next offer of proof concerns the manner in which the ballots were counted in the Regional Director's office, and for that purpose, if the Trial Examiner will refer to Exhibit No. 2 of the General Counsel in which—— [239]

Mr. O'Brien: 2-HHH, I believe is what you want.

Mr. Babbage: In which there appears in Exhibit 2-HHH and 2-III a letter from me, together with a copy of objections to conduct affecting results of the election, which letter and which copy of the objections states what occurred at that time, and Exhibit 2-JJJ, which is the Regional Director's explanation of what occurred at that time, we are prepared to offer additional—or we are prepared to offer proof on that point, but it appears to me that the statement of the objections and the response thereto by the Regional Director clearly state what occurred at that time with the possible exception that there was a—I believe that Mr. O'Brien, who was representing the General Counsel in this proceeding, also talked to Mr. Wright at

the time that Mr. Wright was in the office on that occasion. Do you recall that?

Mr. O'Brien: I have no recollection of it whatsoever.

Mr. Babbage: Well, we can take testimony on that point.

Mr. O'Brien: I wouldn't deny it. If he says he talked to me, he did, there is no doubt about that.

Trial Examiner: Well, now, these matters were called to the attention of the Regional Director prior to the time he made a certification?

Mr. Babbage: Yes. These matters were called to the attention of the Regional Director—no—I withdraw that. You will note from the file that the certification was dated [240] October 21, 1954; that the occasion on which the ballots were counted was on October 19th, 1954, which was only two days before. The objections that I filed with the Regional Director bear the Regional Director's—correction—bear the received stamp of the National Labor Relations Board office in Los Angeles October 26th, so the objections I made to the certification of the Regional Director because of the conduct affecting the results of the election were obviously not known to him until after he had made his certification.

Mr. O'Brien: I am not sure whether this appears in that exchange of correspondence, but—you did finally get into our office on the 19th, didn't you, John?

Mr. Babbage: Oh, yes, but it was after the ballots had been tallied.

Mr. O'Brien: That is all in there, though?

Mr. Babbage: Yes. [241]

* * *

JAMES F. WRIGHT

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Trial Examiner: Mr. Wright, you know you are still testifying under oath?

The Witness: Yes, sir.

By Mr. Babbage:

Q. Mr. Wright, I call your attention to General Counsel's Exhibits 2-HHH, 2-III and 2-JJJ and ask you if you have read those exhibits?

A. Yes, I have.

Q. Do those exhibits from the standpoint that they state what you did or did not do on the occasion which they describe correctly state the situation?

A. Reasonably well, counsel. They——

Q. Is there an additional factor that occurred at that time which is not included in any of those exhibits?

A. Well, if it is all right, I will just review, as most of it is stated here.

The hearing was scheduled for 2:00 o'clock, and I arrived there before 2:00——

Trial Examiner: Now, what kind of hearing is this? [243]

(Testimony of James F. Wright.)

The Witness: I shouldn't have said hearing. The meeting for counting of the ballots was scheduled at 2:00 o'clock at the National Labor Relations Board in Los Angeles.

Trial Examiner: Counting of the challenged ballots?

The Witness: That's right.

Mr. Babbage: May I interrupt the witness for a moment? I would like for the Trial Examiner to know, and the record to show, that our defense on this issue does not include an allegation that there was any miscounting, or that there was any failure on the part of any of the Board representatives to do whatever was honest and correct in connection with the actual counting of the ballots. Our defense goes to the method by which they proceeded, and the fact that a representative of the employer was present and he had been in the office of the Board and that he was not brought into the room where the ballots were counted and tallied, but that representatives of the union were.

Trial Examiner: Well, that makes your position clear.

Mr. Babbage: All right. If you will proceed, Mr. Wright.

The Witness: Exhibit 2-JJJ states that I arrived at 1:45. That could be as close as I could recall, and it also states that I informed the receptionist that I—I asked the receptionist, rather, whether you, Mr. Babbage, had arrived, and that I was to meet him there, and she said that you hadn't

(Testimony of James F. Wright.)

arrived yet, so I commenced to wait for Mr. Babbage's arrival. [244]

As I recall it, in walking up and down the halls and about the receptionist's desk there, that I ran into Mr. O'Brien and as I recall the situation, he recognized me and I recognized him, but neither one of us could state at the time—could think of who the other person was, but we knew we had seen them, and he introduced himself as Mr. O'Brien and I Mr. Wright and then he recalled that we had met at the hearing at Indio the previous April. It was just a short meeting of that type, and then I stayed in the whereabouts there at the office until you arrived, and I think the record shows—Exhibit 2-JJJ shows you arrived at 2:30, and then we proceeded into Mr. Abrams' office, and he informed us that the ballots had been counted.

I think in the receptionist's office there is a telephone in the corner——

Mr. O'Brien: There is a pay telephone there. The government has a regulation, Mr. Wright, that I must not permit you to use my phone on any kind of business and I am forbidden to use my phone on anything except government business, so we have that pay 'phone out there. I apologize publicly to the world for that situation.

The Witness: Well, I used the pay 'phone to call our Los Angeles office and while I was in the 'phone booth—I presume it was somewhere around, shortly before you arrived I did see Mr. Janosco leave the office. [245]

I might state that one of the confusing matters

(Testimony of James F. Wright.)

may have been that I had not previously met Mr. Abrams and actually, from the receptionist's office there, at the time you can see—at least, his office at the time you could see very clearly from—and I did see Mr. Abrams in an office a short distance off, but I had never met him before, so I didn't know that he was the man who was to be counting the ballots. That is my best recollection.

Mr. Babbage: Do you wish to cross-examine?

Mr. O'Brien: I may have one question.

Cross-Examination

By Mr. O'Brien:

Q. In Mr. Helbling's letter to you, had he told you who was going to count the ballots?

A. I am pretty sure we were advised Mr. Abrams was. Now, I could be wrong on that, but I think that was—I don't think Mr. Helbling was in the area.

Q. I don't remember, but I have nothing to add to this and I haven't read these exhibits recently.

Anyway, did you ask for Mr. Abrams when you went to the receptionist's desk?

A. No. The exhibit states the fact I asked the receptionist if Mr. Babbage was there, the best of my recollection now.

Q. And you say you saw Mr. Janosco. Did you speak to him?

A. No. I was in the telephone booth when he walked out. [246]

* * *

JAMES F. WRIGHT

recalled as a witness, having been previously duly sworn, testified further as follows:

Trial Examiner: I believe there were twelve girls who were strikers, who, after the termination of the strike, were offered work on a night shift and who refused to take work on a night shift, that is correct, isn't it, Mr. Wright?

The Witness: That is correct. [250]

* * *

Mr. Babbage: Well, if the Examiner is clear what the March 18th list represents with respect to these particular employees, or any other employees—perhaps it might be well at this point if you would state just what the March 18th list was, Mr. Wright.

The Witness: The March 18th list represented the people who worked during—from September 1st, to December 8th, plus the additional people on the seniority list who had been called back to work, only those who had been called back to work.

Trial Examiner: I so understood.

Mr. Babbage: Did you have any other opportunities, or did you have any opportunities for day work after January 16th, 1954, during that season?

The Witness: Where we would hire new employees?

Mr. Babbage: Yes.

The Witness: No.

Mr. O'Brien: So we may have the scope of this March 18th [257] list in one place—I am not concerned with the order in which the names appear,

(Testimony of James F. Wright.)

but the March 18th list included only employees who were actually working on March the 18th, that is true, is it not?

The Witness: Yes. Anyone who had quit after December 1st, I believe were dropped——

Mr. O'Brien: And it included only persons who had worked after December the 1st, that is, beginning December the 2nd—it did not include the name of anyone who did not work between December 1st and March 18th; anyone who did not work between December the 1st and March 18th, her name was not on the list?

The Witness: By December 1st, you mean starting at 10:05?

Mr. O'Brien: Starting at 10:05, yes.

The Witness: Yes, sir.

Mr. O'Brien: So anyone who was working on December 2nd or 3rd, through January or February, but had quit, her name would not be on the March 18th list?

The Witness: I believe that is right, I believe Miss Hawkins testified on that, and if I am in contradiction to her testimony, her testimony, the chances are, is right.

Mr. O'Brien: Well, the large chart there—the hiring list for 1953-54 shows hires during the week of—I am making this statement, and it is substantiated by the record—shows [258] hires between December the 1st, and December the 8th, and then opposite that name will appear the notation they quit on such and such a date, and that name does

(Testimony of James F. Wright.)

not appear on the March 18th list. Is that your recollection?

The Witness: That is my recollection. [259]

* * *

[Title of Court of Appeals and Cause]

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, “California Date Growers Association and United Packinghouse Workers of America, AFL-CIO, Local Union No. 78,” Case No. 21-CA-2130 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Volume I—Exhibits Introduced in Evidence
General Counsel’s Exhibit No.

1-A Charge filed by Local Union No. 78, United Packinghouse Workers of America, CIO (herein called Charging Party) on December 13, 1954.

1-B Affidavit of service of a copy of the charge mailed December 14, 1954, together with United States Post Office return receipt thereof.

1-C First amended charge filed by charging party on January 5, 1955.

1-D Affidavit of service of first amended charge mailed on January 6, 1955, together with United States Post Office return receipt thereof.

1-E Complaint issued by Acting Regional Director on October 21, 1955.

1-F Notice of hearing issued by Acting Regional Director on October 21, 1955.

1-G Affidavit of service of notice of hearing, complaint and copies of charge mailed October 21, 1955, together with the United States Post Office return receipt thereof.

1-H Respondent's motion for extension of time for filing answer received November 1, 1955.

1-I Respondent's motion for extension of date of hearing received November 1, 1955.

1-J Order extending time for filing answer to complaint dated November 1, 1955.

1-K Order rescheduling hearing dated November 1, 1955.

1-L Affidavit of service of order rescheduling hearing and order extending time for filing answer to complaint, together with United States Post Office return receipt thereof.

1-M Respondent's motion for extension of time for filing answer received November 15, 1955.

1-N Affidavit of mailing of motion for extension

of time for filing answer sworn to November 14, 1955.

1-O Order extending time for filing answer to complaint dated November 15, 1955.

1-P Affidavit of service of order extending time for filing answer to complaint mailed November 15, 1955, together with United States Post Office return receipt thereof.

1-Q Respondent's answer to complaint received December 7, 1955.

1-R Affidavit of mailing of answer sworn to December 5, 1955.

1-S Notice of setting the place of hearing dated December 13, 1955.

1-T Affidavit of service of notice mailed December 13, 1955, together with United States Post Office return receipt thereof.

1-U Acting Regional Director's telegraphic order postponing the hearing dated January 5, 1956.

1-V First amended answer sworn to January 10, 1956.

2-A Petition in Case No. 21-RM-280 filed on December 9, 1953.

2-B Letter of December 10, 1953, from Respondent's attorney to N. L. R. B. enclosing telegram from Union.

2-C Telegram of December 8, 1953, from Union to Calif. Date Growers Assoc. offering to return members to work.

2-D Letter of December 10, 1953, from Field Examiner of the Board to Respondent's Counsel advising that Union refuses to consent to an election.

2-E Order consolidating cases and notice of representation hearing dated December 11, 1953.

2-F Affidavit of service of order consolidating cases and notice of hearing, copies of petitions mailed December 11, 1953, together with United States Post Office return receipt thereof.

2-G Order postponing hearing dated December 17, 1953.

2-H Affidavit of service of order postponing hearing mailed December 17, 1953, together with United States Post Office return receipt thereof.

2-I Field Examiner's Letter of January 5, 1954, to Respondent setting conference.

2-J Field Examiner's letter of January 22, 1954, to Respondent enclosing election agreements.

2-K Consent Election Agreement approved February 5, 1954.

2-L Field Examiner's letter of February 5, 1954, to California Date Growers Assoc. enclosing Notices of Election.

2-M Election Notice.

2-N List of Employees as per January 30, 1954.

2-O Seniority List 1953-54 Season.

2-P Tally of Ballots dated February 18, 1954.

2-Q Certification on Conduct of Election dated February 18, 1954.

2-R Field Examiner's letter of February 25, 1954, to California Date Growers Assoc. enclosing a compilation of challenged ballots.

2-S Compilation of challenged ballots.

2-T Affidavit of Florence Hawkins sworn to March 9, 1954.

2-U Notice of start of operations.

2-V Affidavit of Catherine White.

2-W Affidavit of Beryl Warren sworn to March 9, 1954.

2-X Respondent's letter of March 17, 1954 to Field Examiner.

2-Y Memorandum in Support of Employer's Challenges of Votes.

2-Z Report on Challenges dated March 24, 1954.

2-AA Field Examiner of the Board's letter of March 24, 1954, to Calif. Date Growers Assoc. transmitting report on challenges and setting date for conference.

2-BB Field Examiner's letter of March 29, 1954, to Respondent postponing conference.

2-CC Regional Director's letter of April 2, 1954, to Respondent extending time to file objections to report on challenged ballots.

2-DD Respondent's letter of April 7, 1954, to Field Examiner of the Board enclosing opposition to report on challenges.

2-EE Objections to Report on Challenges.

2-FF Petition for Hearing on Challenges, dated April 7, 1954.

2-GG Order Directing Hearing on Challenges, dated April 22, 1954.

2-HH Affidavit of Service of Order directing hearing on challenges mailed April 22, 1954, together with United States Post Office return receipt thereof.

2-II Order rescheduling Hearing dated April 23, 1954.

2-JJ Affidavit of Service of Order rescheduling

Hearing mailed April 23, 1954, together with United States Post Office return receipt thereof.

2-KK Transcript of hearing before George O'Brien April 29, 1954.

2-LL Union's Post Hearing Brief.

2-MM Respondent's letter of June 1, 1954, to Acting Regional Director transmitting post hearing brief.

2-NN Post Hearing Brief Re: Special Hearing on Certain Challenges dated May 28, 1954.

2-OO Acting Regional Director's letter of June 2, 1954, to United Fresh Fruit & Vegetable Wkrs. Local No. 78 transmitting copy of brief.

2-PP Field Examiner's letter of July 2, 1954 to Respondent requesting committee information.

2-QQ Respondent's letter of July 12, 1954, to Field Examiner returning commerce stipulation.

2-RR Commerce Stipulation signed by Respondent.

2-SS Director of District #5 of United Packing-house Wkrs. letter of September 17, 1954, to Acting Regional Director, sworn to 9/17/54, enclosing to correct name.

2-TT Motion to Correct Name of Union.

2-UU Notice to Show Cause, dated September 22, 1954.

2-VV Affidavit of Service of Notice to show cause, mailed September 22, 1954, together with United States Post Office return receipt thereof.

2-WW Order granting motion, dated October 4, 1954.

2-XX Affidavit of Service of Order granting

motion, mailed October 4, 1954, together with United States Post Office return receipt thereof.

2-YY Supplemental Report on Challenges, dated October 5, 1954.

2-ZZ Field Examiner of the Board's letter of October 5, 1954, to Respondent setting conference to open and count ballots.

2-AAA Field Examiner of the Board's letter of October 8, 1954, to Respondent postponing conference.

2-BBB Respondent's letter of October 13, 1954, to Field Examiner requesting further postponement.

2-CCC Field Examiner's letter of October 14, 1954, to Respondent setting conference date.

2-DDD Respondent's letter of October 19, 1954, to Acting Regional Director Protesting Count.

2-EEE Revised Tally of Ballots, issued October 19, 1954.

2-FFF Affidavit of Service of Revised Tally of Ballots mailed October 19, 1954, together with United States Post Office return receipt thereof.

2-GGG Certification of Representatives signed October 21, 1954.

2-HHH Respondent's letter of October 25, 1954, to Acting Regional Director enclosing objections to revised tally of ballots.

2-III Objections to conduct affecting results of election.

2-JJJ Acting Regional Director's letter of October 27, 1954, to Respondent explaining circumstances of count.

2-KKK Acting Regional Director's letter of Oc-

tober 29, 1954, to Director of Local #78 of Un. Packinghouse Wkrs. of America acknowledging receipt of objections.

2-LLL Union's memorandum in support of conduct affecting results of election.

2-MMM Respondent's letter of October 29, 1954, to Acting Regional Director acknowledging receipt of JJJ and KKK.

3- 1953-54 Hiring Record.

4- Hiring List dated March 18, 1954.

5- Exhibit Withdrawn.

6- 1954-55 Hiring Record.

7-A Women Packers Seniority List, dated November 25, 1952.

7-B Women Graders—Seniority List dated November 25, 1952.

7-C Men—Seniority List dated November 24, 1952.

8- Field Repr. of Un. Packinghouse Wkrs.' letter of October 22, 1954, to California Date Growers Assoc. requesting a meeting.

9- Field Repr. of Un. Packinghouse Wkrs.' letter of November 2, 1954, to California Date Growers Assoc. requesting a meeting.

10- Respondent's letter of November 5, 1954, to Director of United Packinghouse Wkrs. discussing date for meeting.

11- Field Repr. of Un. Packinghouse Wkrs.' letter of November 23, 1954, to California Date Growers Assoc. requesting a further meeting.

12- Field Repr. of Un. Packinghouse Wkrs.'

letter of December 13, 1954, to California Date Growers Assoc. requesting a further meeting.

13- Field Repr. of Un. Packinghouse Wkrs.' letter of December 23, 1954, to California Date Growers Assoc. requesting a further meeting.

14- Respondent's letter to Field Repr. of Un. Packinghouse Wkrs., received January 14, 1955, agreeing to a meeting.

15- Respondent's letter of January 13, 1955, to Field Examiner advising of the Company's position with respect to the unfair labor practice charge.

16- 1954-55 Hiring List—additional to employees on list 3/18/54.

17- List of 1954-55 Applicants not hired.

18-A List of Graders returned in December 10, 1953, after strike.

18-B List of Graders returned in Fall of 1954, without seniority.

18-C List of Graders not returned.

18-D List of Packers returned—January 18, 1954.

18-E List of Packers returned in Fall of 1954, without seniority.

18-F List of Packers not recalled.

18-G List of Men returned January 18, 1954.

18-H List of Men returned in Fall of 1954, without seniority.

18-I List of Men not recalled.

Volume II Certified Record

Stenographic transcript of testimony taken before Trial Examiner William E. Spencer on January 9, 10, 11, and 12, 1956.

Copy of Trial Examiner Spencer's Intermediate Report & Recommended Order dated February 20, 1956..... 1-24

Copy of order transferring case to the National Labor Relations Board, dated February 20, 1956..... 1- 4

Respondent's letter of March 23, 1956, to Executive Secretary of the Board requesting Oral argument (Denied, see 2/, page 1 of Decision and Order)..... 1

General Counsel's exceptions to the Intermediate Report received March 26, 1956..... 1- 2

Copy of Decision and Order issued by the National Labor Relations Board on June 21, 1957 1-13

Petition for Reconsideration of Board's Decision and Order dated June 21, 1957..... 1- 8

Order denying Petition, dated September 3, 1957 1

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 1st day of November, 1957.

[Seal] /s/ FRANK M. KLEILER,
 Executive Secretary, National
 Labor Relations Board.

[Endorsed]: Filed November 6, 1957.

[Endorsed]: No. 15727. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. California Date Growers Association, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed January 20, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CALIFORNIA DATE GROWERS ASSOCIA-
TION,

Respondent.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, California Date Growers Association, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "California Date Growers Association and United Packinghouse Workers of America, AFL-CIO, Local Union No. 78," Case No. 21-CA-2130.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 21, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof post-paid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7)(a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make

and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 24th day of September 1957.

[Endorsed]: Filed September 27, 1957.

[Title of Court of Appeals and Cause]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the Respondent, California Date Growers Association, a California corporation, organized as a non-profit co-operative association (hereinafter sometimes referred to as Cal Date), and through its attorneys Best, Best & Krieger by John D. Babbage of Riverside, California, answers the petition heretofore filed for enforcement of an order of the National Labor Relations Board, and respectfully admits, denies and alleges as follows:

I.

Respondent admits that it is engaged in business in the State of California and that this Court has jurisdiction by virtue of Section 10 (e) of the National Labor Relations Act, as amended, of the petition filed herein. Respondent denies that any unfair labor practice occurred as alleged in said petition or as alleged by the National Labor Relations Board, or that it has ever engaged in any unfair labor practice within the meaning of the National Labor Relations Act, as amended.

II.

Further answering said petition, Respondent denies that the National Labor Relations Board had or has jurisdiction under the National Labor Relations Act, as amended, to order Respondent to cease and desist from refusing to bargain with the United Packinghouse Workers of America AFL-CIO, Local Union No. 78, as the exclusive representative of all of Respondent's employees in the designated unit. Respondent alleges that under the National Labor Relations Act, as amended, and the Constitution, statutes and case law of the United States of America, the Respondent was justified in refusing to bargain with said Union because the Union was not the properly certified bargaining representative for Respondent's employees in the designated unit.

III.

Respondent alleges that the Regional Director of the National Labor Relations Board for the Twenty-

first Region acted arbitrarily and capriciously in deciding that the ballots of twelve employees who had quit their jobs should be counted when the tally of votes for and against the Union in an election were so close that the counting of said ballots affected the final results of said election.

IV.

Respondent alleges that the Regional Director's certification of the Union was invalid because he permitted the challenged ballots to be opened and counted in the absence of Respondent.

V.

Respondent further says in answer to said petition that no violation or violations of the National Labor Relations Act, as amended, have ever occurred on the part of said Respondent, Cal Date, and its agents, officers, servants or employees and that the proofs and testimony taken before the trial examiner, as set forth in the record, fail to indicate any such violations, but rather and instead show a distinct compliance with the provisions of said Act and the provisions of the order of the National Labor Relations Board based upon any such alleged violations are entirely without basis in fact.

VI.

Respondent denies that it discouraged membership in or activities on behalf of the Union or any other labor organization and denies that it discriminatorily reduced the seniority of employees or entirely deprived them of seniority status. Respondent

denies that in any like or related manner it discriminated in regard to hire and tenure of employment or any conditions of employment.

VII.

Respondent denies that it has in any manner interfered with, restrained or coerced its employees in the exercise of their rights to self-organization or to form and join labor organizations or to bargain collectively through representatives of their own choosing or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the National Labor Relations Act, as amended.

VIII.

Respondent denies that it has or has had any discriminatory seniority policy and further denies that its hiring list of March 18, 1954, was a discriminatory seniority policy.

IX.

Respondent denies that it should be required to restore to their prestrike seniority all non-replaced strikers who sought reinstatement at the end of the December 1-8, 1953, strike (except twelve employees who refused work on the night shift of January,

1954). Respondent alleges that it was justified in advancing the seniority of non-strikers because such action was consistent with and for the purpose of protecting and continuing Respondent's business during the strike.

X.

Respondent denies that it should be required to restore the twelve employees who refused work on the night shift of January, 1954, to reduced seniority at the end of the March 18, 1954, hiring list. Respondent alleges that these twelve employees quit their jobs by refusing work on the night shift of January, 1954. Respondent denies that it should be required to offer reinstatement on the basis of restored seniority to employees whom the National Labor Relations Board alleges were discriminated against, and Respondent denies that it has discriminated against any such employees.

XI.

Respondent denies that it should be required, as ordered by the National Labor Relations Board in its order of June 21, 1957, to reimburse any employees whose seasonal hiring was delayed, or whose seasonal layoffs were accelerated, or who otherwise suffered loss of employment because of Respondent's strike seniority policy. Respondent alleges that it did not discriminate against any such employees and Respondent was justified in such strike seniority policy because such action was consistent with and for the purpose of protecting and continuing Respondent's business during the strike.

XII.

Respondent denies that it should be required, as demanded by the Board in its Order of June 21, 1957, to post at its place of business in Indio, California, copies of the notice attached to the Board's Order of June 21, 1957, and Respondent denies that it should be required to do or not do any of the other acts or things required and set forth in Section 2(g) of the Board's Order of June 21, 1957.

XIII.

Respondent alleges that it is following a policy and seniority practices that were formulated at the time of the December, 1953 strike for the purely business purpose of providing continued necessary business operations during its highly seasonal packing requirements for the Christmas trade and such necessary seniority policy was not a violation of the National Labor Relations Act, as amended.

XIV.

Respondent alleges that it has not engaged in and is not engaging in any unfair labor practices under the National Labor Relations Act, as amended, and in particular, Respondent has not committed and is not committing any unfair labor practice with respect to Ola Carden, Anna Lee Tyler, Kathryn White and Pauline Skinner, as charged in the "First Amended Charge Against Employer" filed by the Union with the National Labor Relations Board on January 5, 1955.

XV.

Respondent further says in answer to said petition that it believes that in all instances its management and supervisors and employees fully complied with the National Labor Relations Act, as amended, and committed no violation thereof.

XVI.

Respondent further says in answer to said petition that the Findings of Fact of the National Labor Relations Board are not supported by substantial evidence or at all. That the conclusions of law entered by the Board are not in accord with the Statutes and judicial decisions of the United States of America.

Wherefore, California Date Growers Association, Respondent herein, prays this Honorable Court that said order of said National Labor Relations Board be set aside in its entirety as provided in Section 10(e) in said National Labor Relations Act, as amended, upon the grounds and for the reasons hereinabove set forth and that the petition of the National Labor Relations Board be dismissed.

BEST, BEST & KRIEGER,

By /s/ JOHN D. BABBAGE,

Attorneys for Respondent.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed October 14, 1957.

[Title of Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner herein, intends to rely upon the following points in this case:

I. The Board properly found that respondent violated Section 8 (a)(5) and (1) of the Act by refusing to bargain collectively with the certified representative of its employees.

A. The Board's rulings in the representation proceeding with respect to the eligibility of voters and the procedure for counting ballots were proper.

II. Substantial evidence supports the Board's finding that respondent, in violation of Section 8 (a) (3) and (1) of the Act, reduced or abolished the seniority of unreplaced economic strikers after the strike as a penalty for striking.

Respectfully submitted,

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 1st day of November, 1957.

[Endorsed]: Filed November 6, 1957.

